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Cover Page Footnote

Associate Professor, George Mason University School of Law; Commissioners, U.S. Sentencing Commission. We would like to thank Jeffery Parker of George Mason University for his helpful comments, as well as Timothy Drisko and Sara Meacham, both research assistants in the Office of Policy Analysis at the U.S. Sentencing Commission, for their assistance. The opinions expressed in this paper are those of the authors, and do not necessarily reflect the opinions or the policies of the U.S. Sentencing Commission. The accuracy of the data used in this Article is based on the authors' own examination of the data generated to evaluate the efficacy of federal criminal history categories. *Senior Research Associate, Office of Policy Analysis, U.S. Sentencing Commission. *Senior Research Associate, Office of Policy Analysis, U.S. Sentencing Commission.

PAST AS PROLOGUE: RECONCILING RECIDIVISM AND CULPABILITY

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On the front of the National Archives Building in Washington, D.C., home to the original copies of the Constitution and Declaration of Independence, is the inscription “what’s past is prologue.”¹ The inscription befits the National Archives collection, which consists of important American historical documents central to shaping the nation’s future. The idea expressed by that aphorism is a significant one, for it suggests that the past *is* the future. Not only does the past affect the future, but past events are necessarily repeated. This understanding is true not only with respect to historical events and their impact upon the nation, but is also relevant to the way in which human beings interact on a social level. We tend to assume—rightly or wrongly—that people who acted in a particular way in the past are likely to act in a similar fashion in the future. Indeed, many of our common judgments with respect to an individual’s character are based upon our past interactions with that person and our assumption that her future actions will conform with those of her past. Reputation matters and serves as a means of assessing individual behavior.

Judgments about an individual’s past behavior take on a particular urgency in the criminal justice system. While the Federal Rules of Evidence, by and large, exclude information from a defendant’s past from being introduced at trial,² they do not exclude this information

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1. William Shakespeare, *The Tempest* act 2, sc. 1.

2. Fed. R. Evid. 404(b).

because of a belief that past actions by an individual are irrelevant for judging present conduct, but rather out of a concern that past misdeeds make it more likely that a jury will be prejudiced in its assessment of present facts.³ The legal system traditionally accepts the notion that the jury ought to convict on the basis of the facts adduced at trial and not out of a belief that the defendant's character was "bad" and assume that he acted in conformity with that character in committing the present offense.

Despite this understanding, however, former convictions may be entered into evidence under certain circumstances.⁴ Often, the jury has before it evidence of the defendant's criminal past. More importantly, evidence of past criminal activity has long been used to fashion a convicted defendant's sentence for a present offense.⁵ The long-standing idea seems to be that repeat offenders are deserving of greater punishment because they are already familiar with the criminal justice system and "should have known better" than to have run afoul of the law again.⁶ In other words, the repeat offender's culpability is greater than the offender who has never before run afoul of the law. Similarly, there exists a commonly accepted wisdom that because the repeat offender was not adequately deterred from engaging in criminal conduct, the sentence for any subsequent crimes must be greater.⁷ There exists the conventional notion that past criminal conduct may be predictive of future criminality. These ideas undergird much of the rationale behind so-called "three strikes" laws or career offender penalty enhancements.⁸

The literature on sentencing philosophy reverberates in debate with respect to the appropriateness of using offenders' criminal histories when determining their sentences for present convictions.⁹ One note of near concordance regarding the use of criminal history in sentencing, however, is that, all other things being equal, first-time offenders are deserving of lower sentences than repeat offenders.

3. See, e.g., *Old Chief v. United States*, 519 U.S. 172, 180-81 (1997); *Michelson v. United States*, 335 U.S. 469, 475-76 (1948).

4. See Fed. R. Evid. 609.

5. See generally Bureau of Justice Assistance, U.S. Dep't of Justice, 1996 Nat'l Survey of State Sentencing Structures 3 (1998).

6. See generally Aaron J. Rappaport, *Rationalizing the Commission: The Philosophical Premises of the U.S. Sentencing Guidelines*, 52 Emory L.J. 557 (2003).

7. See *State v. Dennis*, 686 N.E.2d 901 (Ind. Ct. App. 1997); see also *State v. Greever*, 878 P.2d 838 (Kan. Ct. App. 1994); *State v. Kirkpatrick*, 480 S.E.2d 400 (N.C. 1997).

8. See, e.g., James A. Ardaiz, *California's Three Strikes Law: History, Expectations, Consequences*, 32 McGeorge L. Rev. 1 (2000); see also Alexander Silvert, *Federal Three Strikes Law: Is There Any Hope for the Truly Hopeless?*, *The Champion*, Jan.-Feb. 2000, at 18.

9. See Julian V. Roberts, *The Role of Criminal Record in the Sentencing Process*, in 22 *Crime and Justice: A Review of Research* 303 (Michael Tonry ed., 1997), for a review of the issues in this debate.

Congress, in fact, has expressly directed the United States Sentencing Commission (the "Commission") to consider the "appropriateness of imposing a sentence other than imprisonment" in cases "in which the defendant is a first offender."¹⁰ A general consensus thus exists that the *lack* of a prior conviction ought to play some role in sentencing in the same fashion as does the existence of a criminal record. Absence of a criminal past might suggest that the offender merits some sort of penalty mitigation.

The sentencing literature essentially provides two arguments for granting relative leniency to first-time offenders. The first argument is that such offenders are less culpable offenders overall because they have no prior record of law violation.¹¹ Their lack of familiarity with the criminal justice system, coupled with the hope that their instant behavior is anomalous, drives a natural desire to treat first-time offenders with greater leniency. The second argument is that first-time offenders are much less likely to recidivate than repeat offenders and, therefore, the need for their criminal incapacitation is less compelling.¹² This, of course, reflects an optimistic view of human behavior and the efficacy of the deterrence function of the criminal justice system, as it is difficult, upon commission of a first offense, to determine whether the defendant will go on to emulate Professor James Moriarity, Sir Arthur Conan Doyle's "Napoleon of Crime,"¹³ or Jean Valjean, Victor Hugo's penitent and reformed protagonist.¹⁴ Regardless, the prevailing view is that first-time offenders ought to be treated differently from recidivists, even when they commit precisely the same instant offense. Whether this stems from a human desire to be merciful, or a pragmatic desire to commit scarce resources to hardened offenders while finding less costly alternatives to deal with seemingly less culpable offenders, is beside the point. Either way, first offenders tend to receive punishments that are not nearly as severe as those of recidivists.

This Article evaluates competing definitions of what constitutes a federal "first-time" offender and identifies options for incorporating a first offender provision into the Federal Sentencing Guidelines. Part I examines the status of recent research defining a federal first-time offender,¹⁵ and Part II describes the data and methods used in the

10. See 28 U.S.C. § 994(j) (2000).

11. U.S. Sentencing Comm'n, Supplementary Report on the Initial Sentencing Guidelines and Policy Statements 41 (1987).

12. *Id.* at 41-42.

13. Sir Arthur Conan Doyle, *The Final Problem*, in *The Adventures and Memoirs of Sherlock Holmes* 464 (Modern Library 2002).

14. Victor Hugo, *Les Misérables* (Charles E. Wilbourn trans., The Modern Library 1992) (1862).

15. See *infra* Part I.

analysis.¹⁶ Part III contrasts the characteristics of the three proposed first offender groupings among themselves, and in relation to offenders in the remaining criminal history categories, to demonstrate the unique nature of federal offenders with little or no criminal history.¹⁷ Part IV looks at the impact of various first offender definitions on the predictive power of the Federal Sentencing Guidelines' chapter four.¹⁸ Part V then proposes first offender provision options and discusses how first offender sentencing alternatives might be implemented.¹⁹ Part VI summarizes the findings of the study, highlighting policy and empirical debates that require resolution prior to implementation, including specific legal conflicts arising from the introduction and operationalization of a first offender provision.²⁰ Essentially, the Article concludes that the criminal history categories used in the Federal Sentencing Guidelines have served as a reasonably reliable indicator in determining both culpability and the likelihood the offender will commit future criminal acts. This Article does suggest, however, that the criminal history categories need to be refined to improve recidivism measures.

The rationale is two-fold: namely, that offenders with no prior criminal record both lack the greater culpability of recidivists, and, based upon modeling done of the criminal history categories, present the least likely risk of re-offending. This Article also identifies important policy issues that must be settled. For example, the research demonstrates that offenders who have no prior convictions, but who do have prior arrests, are nearly as likely to commit criminal acts in the future as those with previous convictions. While the use of arrests, without convictions, as a means of establishing a Criminal History Category score appears to run against the grain of simple fairness, excluding such information from the calculation of criminal history negatively affects the model's predictive power. If the goal is to create criminal history category scores that will most effectively predict (among other things) the likelihood of recidivism, then mere arrests ought to be included. This is only one of the many difficult issues policy makers must address. Compromise, however, is necessary to the policymaking process; the decision of how to construct criminal history categories must necessarily be based upon both empirical findings and political realities.

I. BACKGROUND ON THE FEDERAL GUIDELINE FIRST OFFENDER PROVISION

While the propriety of using an offender's criminal past as a means

16. *See infra* Part II.

17. *See infra* Part III.

18. *See infra* Part IV.

19. *See infra* Part V.

20. *See infra* Part VI.

of calculating his present sentence has long sparked controversy, policy makers have tended to follow the historical precedent of using criminal history as at least one factor in determining an offender's current punishment.²¹ To this end, the original Commission decided that criminal history ought to play a major role in establishing uniform national sentencing guidelines. As a result, the Commission adopted chapter four of the Guidelines, "Criminal History and Criminal Livelihood," as the principal means of employing the defendant's criminal record to calculate her present sentence.²²

Essentially, the Federal Sentencing Guidelines determine an individual offender's sentence length based on the computation of values contained on two axes of a sentencing table.²³ The row axis represents offense severity, which ranges from level 1 to level 43.²⁴ This offense severity is tied to both the nature of the offense of conviction and a measurement of the social harm. The column axis of the table, which will inform this discussion, consists of criminal history, which ranges from Criminal History Category I ("CHC I") to Criminal History Category VI ("CHC VI") and is based on the underlying sum of points assigned to certain qualifying prior convictions.²⁵ Offenders with zero criminal history points fall into CHC I, but may or may not have a prior criminal record, as explained below.

Although, at first blush, the criminal history calculation may appear straightforward, it is often a complicated determination. Some federal offenders who have zero criminal history points, which might suggest that they have clean records, may nevertheless have had prior contact with the criminal justice system. This occurs because the Guidelines' rules used to calculate criminal history points exclude from consideration certain types of prior convictions.²⁶ Thus, one's record need not be spotless to be scored with zero points. Prior events in the criminal history system that do not result in the assignment of criminal history points can involve a prior arrest and conviction that, for example:

- occur a substantial number of years prior to the federal instant offense per guideline definition;²⁷

21. See 1 Research on Sentencing: The Search for Reform 83-87 (Alfred Blumstein et al. eds., 1983).

22. U.S. Sentencing Guidelines Manual § 4A1.2 (2002).

23. See *id.* § 5A.

24. *Id.*

25. *Id.* Criminal history also comes into play in the so-called "Armed Career Criminal" enhancement contained in section 4B1.4, which provides a sentencing enhancement for those defendants who, under 18 U.S.C. § 924(e) (2000), were armed and who have at least three prior convictions for a "violent felony" or a "serious drug offense." See U.S. Sentencing Guidelines Manual § 4B1.4, cmt. n.1.

26. U.S. Sentencing Guidelines Manual ch.4.

27. *Id.*

- meet specific disqualifying conditions, such as occurring under tribal or foreign law, or for a juvenile status offense;²⁸ or
- involve a specific minor offense, per guideline definition.²⁹

In addition, prior contacts with the criminal justice system that only involve an arrest do not receive criminal history points, regardless of whether: (1) the charges were dropped or otherwise not prosecuted; (2) the disposition was not guilty or the individual was otherwise found not responsible for the offense; or (3) the disposition of the arrest is pending at the time of sentencing for the instant offense.³⁰

Because of these exemptions, any given individual federal offender who has zero criminal history points may nonetheless have prior arrests and/or prior convictions.³¹ This complicates the identification of a first offender grouping using the Guidelines' criminal history categories because those who have zero criminal history points in actuality may represent various types of offenders with regard to prior offending. At one end of the continuum are some alleged offenders with zero criminal history points who have absolutely no prior recorded contact—not even a prior arrest—with the criminal justice system. At the other end of the continuum are offenders with zero criminal history points who have prior convictions, maybe even for serious crimes, but for whom points are not applicable because of the exclusionary criteria of the chapter four guidelines.

Defining a “first offender” under the Guidelines' system therefore requires both an empirical perspective and a subjective decision. In an earlier article, an effort was made to identify and describe first

28. *Id.*

29. *Id.*

30. *Id.*

31. For example, suppose that a forty-year-old federal offender was found truant from school at age fifteen, convicted of (and sentenced to thirty days in jail for) a petty larceny at age nineteen, received a traffic speeding ticket at age thirty-eight, and was awaiting trial for a prior robbery conviction at the time when he was being sentenced for his federal instant offense. The truancy and speeding violation never receive criminal history points under the Guidelines. *See id.* § 4A1.2(c)(2). The petty larceny does not receive criminal history points because it occurred more than ten years prior to the instant offense and had a sentence of thirty days. *See id.* § 4A1.2(e)(3). As the offender has not had an “adjudication of guilt” for the robbery, no criminal history points are assigned. *See id.* § 4A1.2(a)(1). This offender would have zero criminal history points under the guideline rules. Note that the Federal Sentencing Guidelines provide discretion for the judge to depart from the guideline range when the actual criminal history point calculation appears to underrepresent or overrepresent the offender's criminal past. *See id.* § 4A1.3. Although the Supreme Court's decision in *Blakely v. Washington*, 124 S. Ct. 2531 (2004), which relied on its earlier precedent of *Apprendi v. New Jersey*, 530 U.S. 466 (2000), may call the Federal Sentencing Guidelines into question, it is interesting to note that even the *Blakely* majority does not suggest that the use of prior convictions to increase a sentence would run afoul of the Sixth Amendment. Thus, provided the calculation of criminal history is based upon actual prior convictions, it should not be affected by *Blakely* or any of its potential progeny.

offenders sentenced under the Federal Sentencing Guidelines.³² That article highlighted the importance that Congress placed upon first offender status for special sentencing consideration, pointing out that Congress expressly directed the Commission to “insure that the guidelines reflect the general appropriateness of imposing a sentence other than imprisonment in cases in which the defendant is a first offender who has not been convicted of a crime of violence or an otherwise serious offense.”³³

In an effort to grapple with the problem of first-time offender status, the article offered a working definition of “first-time offenders,” which it determined to be those offenders who have no prior convictions of any type.³⁴ The article further suggested that first offender status might be considered in the Guidelines with either a new first offender CHC or a guided departure or adjustment.³⁵ Using a special study datafile for a random sample of federal offenders sentenced in fiscal year 1995, the article described the criminal history attributes of offenders in CHC I.³⁶ The article noted that CHC I offenders comprise the bulk of the federal inmate population,³⁷ and that the Commission has been unsuccessful in implementing the congressional directive.³⁸ The article ended by commenting on the limitations of the 1995 data and called for development of a recidivism datafile that would allow researchers to describe more completely the past criminal record of potential first offenders and to analyze more fully the recidivism risk they pose compared to repeat offenders.³⁹ In sum, such new recidivism data would allow analyses that more fully inform the development of a possible first offender guideline sentencing provision.

Since publication of that earlier article, the Commission has completed preparation of an extensive recidivism datafile.⁴⁰ The empirical depth of the new datafile allows for a more detailed evaluation of the first offender concept. The analysis of this data examined and compared the backgrounds and recidivism behavior of the offenders logically considered as potential first offenders, defined in terms of their criminal history, their instant offense, and their computed recidivism risk.⁴¹

32. Michael Edmund O'Neill, *Abraham's Legacy: An Empirical Assessment of (Nearly) First-Time Offenders in the Federal System*, 42 B.C. L. Rev. 291 (2001).

33. 28 U.S.C. § 994(j) (2000).

34. See O'Neill, *supra* note 32, at 312.

35. See *id.* at 344.

36. See *id.* at 317-23.

37. See *id.* at 316.

38. See *id.* at 343.

39. See *id.* at 341-42.

40. See U.S. Sentencing Comm'n, FY 1992 Recidivism Sample (U.S. Citizens) (2003) (on file with the authors) [hereinafter FY 1992 Recidivism Sample].

41. Linda Drazga Maxfield et al., U.S. Sentencing Commission, Recidivism and

As a result, this Article focuses exclusively on offenders with zero criminal history points because it seems to be the most salient source for creating a first offender definition. To focus solely on CHC I would be misleading, because that category contains convicted individuals who may have committed a prior offense and may have received at least a single criminal history point. Even excluding these "one-pointers," however, does not entirely create a clear picture. One of the difficulties in this area is determining who constitutes a *true* first-time offender. Most people would think that such a person would be one who had never previously been convicted of an offense. The original Commission, however, in establishing its Criminal History Categories, instead adopted a series of rules for allowing defendants to have zero criminal history points who nevertheless had been previously convicted of a crime.⁴² The Commission chose not to count (for Criminal History Category purposes) certain juvenile convictions, as well as to permit the exclusion of certain "old" offenses.⁴³ Similarly, certain minor convictions may not be included in the criminal history score calculation.⁴⁴

Thus, three subgroupings of these so-called "zero-point" offenders emerge:

Proposed First Offender Groups	Zero Criminal History Points?	Prior Arrests?	Prior Convictions?	% of All Citizen Offenders
A (no arrests)	Yes	No	No	29.8
B (no convictions)	Yes	Yes	No	8.4
C (minor convictions only)	Yes	Yes	§ 4A1.2(c)(2) offenses only	1.5

The policy and empirical groundwork that motivates these proposed first offender groupings are well documented in historical Commission documents. As early as 1989, Commission working groups internally proposed a definition of first offenders similar to the above Group A (i.e., zero criminal history points and not even a single prior arrest).⁴⁵ The Group A concept was also presented by the Commission for public consideration and comment.⁴⁶ Group B (i.e.,

the "First Offender" (forthcoming 2004).

42. O'Neill, *supra* note 32, at 311.

43. U.S. Sentencing Guidelines Manual § 4A1.1, cmt. n.1 (2002).

44. *Id.* § 4A1.2(c)(2).

45. See Memorandum from the Working Group on Criminal History to Phyllis Newton, U.S. Sentencing Commission, Proposed Amendments to Criminal History Chapter (Dec. 20, 1989).

46. Sentencing Guidelines and Policy Statements for Federal Courts, 57 Fed. Reg. 90 (Jan. 2, 1992).

zero criminal history points and prior arrests, but no prior convictions) is a less restrictive first offender definition than that for Group A. Finally, the Group C alternative permits a zero-point offender to have convictions, but only for minor offenses that never receive criminal history points under the Guidelines, as specifically listed in section 4A1.2(c)(2).⁴⁷ Because of the less serious nature of their prior conviction offenses and their low recidivism rates, Group C may also be considered for first offender status.

These first offender definitions account for a large percentage of federal offenders. Using information from the recidivism datafile based on fiscal year 1992,⁴⁸ just under 30% (29.8%) of all U.S. citizen⁴⁹ federal offenders meet the definition of Group A, as it includes offenders with no previous arrests. Using the Group B definition, an additional 8.4% (for a total of 38.2%) of U.S. citizen offenders would meet the first offender criteria.⁵⁰ Group C would appear to add an additional 1.5% of all U.S. citizen federal offenders (for a total of 39.7%). First offenders, however narrowly that group is defined, thus make up a significant share of the federal prison population. This Article's contention is that present offenders who have no prior criminal history of any sort ought not to be lumped together with those who have committed previous crimes.

II. DATA AND METHODS

The descriptions of first offenders provided here rely on two datafiles containing prior instant offense criminal records and post-

47. Section 4A1.2(c)(2) listed the following offenses that never receive points under the Guidelines: hitchhiking, juvenile status offenses and truancy, loitering, minor traffic offenses such as speeding, public intoxication, and vagrancy. *See* U.S. Sentencing Guidelines Manual § 4A1.2(c)(2). Offenses "similar" to these, "by whatever name they are known," also never receive criminal history points. *Id.* A previous criminal history working group suggested that offenders with only section 4A1.2(c)(2) "never counted" convictions be included in the first offender definition. *See* Memorandum from Jay Meyer, Work Group Coordinator, to Phyllis Newton, U.S. Sentencing Commission, Criminal History Working Group Discussion Concerning Categories "0" and "VII" (Nov. 20, 1990). These "never count" minor offenses are consistent with a first offender criterion because their presence does not improve recidivism prediction, as documented in the companion recidivism project report, "The Exclusionary Rules." *See id.*

48. FY 1992 Recidivism Sample, *supra* note 40. For further explanation of the datafile, see *infra* Part II.

49. Restricting the examined group to U.S. citizen federal offenders is necessary, in part, because it is difficult to know whether foreign offenders—who make up an ever-increasing portion of the federal prison population—have prior criminal records. It is often difficult to obtain the foreign defendant's criminal history from the foreign jurisdiction.

50. Group B has less restrictive criteria than Group A. As such, all offenders in Group A by definition meet the criteria of Group B (and Group C, as well). Likewise, Group C is a less restrictive subset than Group B. Offenders in Group B also by definition meet the criteria of Group C.

instant offense recidivism information.⁵¹ The first datafile⁵² contains a stratified random sample of all U.S. citizens⁵³ sentenced under the Guidelines during fiscal year 1992 whose sentencing documents were received by the Commission for its annual guideline sentencing datafile. The recidivism datafile contains a complete record of the offender's criminal history prior to the instant offense, as documented in the pre-sentence report completed by the federal probation officer. Pre-sentence reports provide information about offenders' demographic and personal characteristics, prior arrests and convictions, and the reasons prior convictions were excluded from receiving criminal history points. This datafile allows analysis of each of the potential first offender groups described in A, B, and C above.

The second datafile⁵⁴ contains records for 1918 offenders from a 5% simple random sample of all federal offenders who were sentenced in fiscal year 1995 and who had data reported to the Commission's annual guideline sentencing datafile. This Intensive Study Sample ("ISS") datafile is similar to the 1992 U.S. citizen data in that it includes extensive prior record information coded from pre-sentence reports.⁵⁵ When the Commission collected recidivism information for the 1992 sample in 2001, it also supplemented the ISS with recidivism information. While these 1995 data are limited with regard to prior non-conviction arrest information (it does not allow the identification of offenders with no prior arrests), it does contain both U.S. citizens and noncitizens, and thus permits calculations of recidivism rates for both citizens and noncitizens. These further analyses regarding noncitizens are important because, as will be shown, a large percentage of offenders in 1995 with no prior convictions (and who as such might qualify for first offender status) are noncitizens.

The National Crime Information Center's ("NCIC") automated files provided criminal history records, often referred to as "RAP

51. See U.S. Sentencing Comm'n, FY 1995 Intensive Study Sample Sample & 2003 Recidivism Supplement (on file with authors) [hereinafter FY 1995 ISS Sample]; FY 1992 Recidivism Sample, *supra* note 40.

52. FY 1992 Recidivism Sample, *supra* note 40.

53. Only U.S. citizens were sampled because prior research suggests that nearly all noncitizen federal offenders are deported to their home countries after completing their sentence. Criminal history records are not reliably available from many foreign countries and, therefore, measuring recidivism for noncitizens with domestic criminal history datafiles may result in error-prone recidivism results for noncitizens. See Miles D. Harer, *Do Guideline Sentences for Low-Risk Drug Traffickers Achieve Their Stated Purposes?*, 7 Fed. Sentencing Rep. 22, 24 (1994).

54. FY 1995 ISS Sample, *supra* note 51.

55. Initially, the Commission created this 1995 datafile, in part, to allow a more detailed description of the relationship between offenders' criminal history records and the criminal history points they received under the Guidelines than is possible with the data routinely collected by the Commission. See Linda Drazga Maxfield, *Prior Dangerous Criminal Behavior and Sentencing Under the Federal Sentencing Guidelines*, 87 Iowa L. Rev. 669 (2002).

sheets,” from which post-instant-offense recidivism information was obtained for both the 1992 and the 1995 sample. For the purpose of this analysis, “recidivism” is defined as any one of the following during the first two years back in the community after the federal sentencing: (1) a reported conviction; (2) a re-arrest with no disposition information available on the post-release “RAP sheet” criminal history record; or (3) a supervision revocation while under probation or other types of post-prison supervision.⁵⁶

The offender background and instant offense descriptions provided in Part III are based on the full datafile samples. The recidivism analysis, however, is limited to only a subset of sampled offenders: those who have returned to the community and are at risk of recidivating for two years. For probation offenders, this means that the period for measuring recidivism began at the time of sentencing for the federal instant offense and continued for the subsequent twenty-four months. For those offenders receiving prison, however, the period used to measure recidivism begins at the time of release from prison and continues for the subsequent twenty-four months. Using the date of June 1, 2001 as the analysis cut-off date, any prison offender who had not been released from prison by June 1, 1999 does not meet the two-year “window of inclusion” criteria and is not included in the recidivism analysis. These offenders were selected because it is more likely that they have had sufficient opportunity to re-offend. One of the most significant difficulties with the data set used is that offenders sentenced under the federal guidelines, which went into effect in late 1987, are only now beginning to be released. It is our hope that this research will establish a baseline to which we can return as more offenders are released from prison so that we can continue to track recidivist behavior. Nevertheless, based upon the available data, all of the potential first offender groups are within CHC I, and more than 90% (91.2%) of category I offenders meet the window of inclusion criteria.

Data cited throughout this Article are weighted to represent the entire comparable population of fiscal year 1992 offenders who were U.S. citizens (for the 1992 datafile) and all 1995 offenders (for the 1995 datafile) sentenced under the Federal Guidelines.

56. The recidivism definition used here addresses the state of post-release criminal behavior records. Although offense information from fingerprint cards, produced at the time of arrest, is nearly always recorded in the NCIC datafile from which recidivism measures are generated, disposition information regarding those arrests may or may not be recorded, depending on the policies and practices of each jurisdiction. For this reason, many published recidivism studies, confronted with the same incomplete arrest disposition information, argue that the recidivism measure used here provides the most reliable and valid measure of the probability of actual re-offending compared to use of re-convictions only. See Cassia Spohn & David Holleran, *The Effect of Imprisonment on Recidivism Rates of Felony Offenders: A Focus on Drug Offenders*, 40 *Criminology* 329 (2002).

III. EXAMINING THE FIRST OFFENDER GROUPINGS

This part discusses characteristics of the proposed first offender groupings relative to other federal offenders sentenced under the Guidelines. The descriptions highlight the distinctive profile of offenders with no criminal history points in terms of their demographic and personal characteristics; their instant offense of conviction and instant offense sentence characteristics; their recidivism risk; and their prior arrests and convictions. In addition, data from the 1995 offender sample compares the recidivism risk posed by citizen and noncitizen offenders, including identification of noncitizen offenders with no prior convictions.

A total of 29,749 U.S. citizens were sentenced under the Guidelines in 1992. These individuals are represented in the following tables.⁵⁷ More than 60% (60.7%, or 18,066) of these offenders were in CHC I, having zero or only one criminal history point. Fewer than half of the U.S. citizen offenders (39.3%, or 11,683) have two or more criminal history points and appear in CHC II through VI. The offenders in these five categories are termed "CHC II through VI" during the analysis.

In CHC I only, the vast majority (82.2%) have zero criminal history points and the remaining 17.8% have one criminal history point. All of the proposed first offender groups—Group A, Group B, and Group C—are drawn from offenders who have zero criminal history points. Group A has no prior arrests. Group B has prior arrests, but no prior convictions. Group C has only past convictions for offenses that never receive criminal history points under guideline rules. The three proposed first offender groupings subsume the bulk of all offenders with zero points. Only 20.4% (or 3221) of the 14,845 offenders with zero points do not fall into one of the proposed first offender groupings.

A. *Demographic and Personal Characteristics*

Tables 1 through 3 provide descriptions of the demographic and personal characteristics of the three first offender candidate groups, along with the remaining CHC I offenders and the combined CHC II through VI offenders for fiscal year 1992.

Table 1 shows that the three first offender Groups A, B, and C are disproportionately female and disproportionately white compared to all other U.S. citizen offenders sentenced in 1992. The gender difference is most pronounced for Group A offenders, who are nearly 40% female (37.4%), while offenders in CHC II through VI are only 9.1% female. Likewise, Group A's racial distribution is the most dissimilar from that of the offenders in CHC II through VI: some

57. See Tables 1 through 13 accompanying *infra* notes 58, 61, 70, 75, 84, 89, 96, 100-01, 104, 111, 126, 143.

66.1% of Group A offenders are white, compared to 49.9% of offenders in CHC II through VI. First offender groups do not appear to differ significantly in their age compositions either among themselves or among the other offender categories shown. This might come as a surprise only because an older offender might be assumed to have amassed a more lengthy criminal record and consequently have obtained a higher CHC score.

TABLE 1.⁵⁸ DEMOGRAPHIC CHARACTERISTICS OF OFFENDERS BY CRIMINAL HISTORY CATEGORY AND CRIMINAL HISTORY POINTS WITH DETAILS FOR ZERO-POINT OFFENDER CATEGORIES
RECIDIVISM STUDY 2003

	CRIMINAL HISTORY CATEGORY I												CATEGORIES II – VI	
	ZERO-POINT OFFENDERS										ONE-POINT OFFENDERS		TWO OR MORE-POINT OFFENDERS	
Demographic Characteristics	Total Zeroes		Group A <i>no arrests</i>		Group B <i>no convictions</i>		Group C <i>never-count convictions⁵⁹</i>		Remaining Zeroes					
	N	%	N	%	N	%	N	%	N	%	N	%	N	%
TOTAL	14,845	100.0	8,854	100.0	2,499	100.0	460	100.0	3,032	100.0	3,221	100.0	11,683	100.0
Gender														
Female	4,459	30.0	3,308	37.4	653	26.1	103‡	22.3	395	13.0	463	14.4	1,057	9.1
Male	10,386	70.0	5,546	62.6	1,846	73.9	357	77.7	2,637	87.0	2,758	85.6	10,626	91.0
Race/Ethnicity														
White	9,365	63.5	5,849	66.1	1,472	58.9	270	62.0	1,775	59.8	1,930	61.2	5,773	49.9
Black	3,798	25.7	2,016	22.8	738	29.5	119	27.3	926	31.2	959	30.4	4,838	41.8
Hispanic	1,173	8.0	756	8.5	237	9.5	23‡	5.2	157	5.3	195	6.2	703	6.1
Other ⁶⁰	420	2.8	232	2.7	52‡	2.1	24‡	5.6	110‡	3.7	68‡	2.2	250	2.2
Age														
Under 21	871	5.9	522	5.9	197	7.9	10‡	2.3	141	4.7	220	6.8	478	4.1
21 – 25	2,112	14.2	1,189	13.4	483	19.3	90‡	19.7	349	11.5	498	15.5	2,084	17.9
26 – 30	2,302	15.5	1,383	15.6	490	19.6	68‡	14.8	361	11.9	715	22.2	2,495	21.4
31 – 35	2,277	15.4	1,260	14.3	394	15.8	86‡	18.6	537	17.7	519	16.1	2,432	20.8
36 – 40	2,096	14.1	1,273	14.4	311	12.4	92‡	20.0	420	13.9	406	12.6	1,696	14.5
41 – 50	3,051	20.6	1,811	20.5	410	16.4	56‡	12.1	774	25.5	706	21.9	1,831	15.7
Over 50	2,127	14.3	1,406	15.9	214	8.6	57‡	12.5	450	14.8	157	4.9	658	5.6
Mean Age		36		37		33		35		38		33		33
Median Age		35		35		31		33		37		31		31
‡ Indicates fewer than 10 unweighted sample subjects. Findings may not be statistically significant.														

‡ Indicates fewer than 10 unweighted sample subjects. Findings may not be statistically significant.

58. FY 1992 Recidivism Sample, *supra* note 40. Missing data are excluded, unless specified.

59. Refers to prior arrests with no dispositions and convictions for only the “never-count” offenses specifically listed in section 4A1.2(c)(2). See U.S. Sentencing Guidelines Manual § 4A1.2(c)(2) (2002).

60. “Other” race/ethnicity category includes Native Americans and Asians.

Turning to the social and personal characteristics described in Table 2, the first offender groups were less likely to have used illicit drugs in the year prior to their instant offense than were other offenders sentenced in 1992. This may be a result of the fact that many who fit within the first offender definition were convicted of fraud offenses. Fraud offenders, for whatever reason, tend to be much less likely to have committed a prior offense than other categories of offenders. This may be a result of the sophistication of their criminal conduct (harder to detect), their ability to retain counsel (harder to prosecute), or general sociological issues relating to socioeconomic status or level of education (more likely to be married or to have obtained a college degree). The first offender groups, as well as the other CHC I group, have higher rates of recent pre-offense employment (between roughly 80% and 90%) than offenders in CHC II through VI (roughly 68%). All of these CHC I groups are also more likely to be married (between 33.9% and 48.0%) than are CHC II through VI offenders (23.1%). Once again, this may be explained by the disproportionate number of so-called white collar offenders in this group, who might be assumed to live in more conventional family arrangements.

TABLE 2:⁶¹ SOCIAL AND PERSONAL CHARACTERISTICS OF OFFENDERS BY CRIMINAL HISTORY CATEGORY AND CRIMINAL HISTORY POINTS WITH DETAILS FOR ZERO-POINT OFFENDER CATEGORIES RECIDIVISM STUDY 2003

	CRIMINAL HISTORY CATEGORY I												CATEGORIES II – VI	
	ZERO-POINT OFFENDERS										ONE-POINT OFFENDERS		TWO OR MORE-POINT OFFENDERS	
Social/ Personal Characteristics	Total Zeroes		Group A <i>no arrests</i>		Group B <i>no convictions</i>		Group C <i>never-count convictions</i>		Remaining Zeroes					
	N	%	N	%	N	%	N	%	N	%	N	%	N	%
TOTAL	14,845	100.0	8,854	100.0	2,499	100.0	460	100.0	3,032	100.0	3,221	100.0	11,683	100.0
Illicit Drug Use ⁶²														
No Illicit Drug Use	11,072	74.6	7,002	79.1	1,804	72.2	359	78.0	1,907	62.9	2,174	67.5	6,358	54.4
Illicit Drug Use	3,773	25.4	1,852	20.9	695	27.8	101	22.0	1,125	37.1	1,047	32.5	5,325	45.6

⁶¹. FY 1992 Recidivism Sample, *supra* note 40. Missing data are excluded, unless specified.

⁶². This column refers to prior arrests with no dispositions and convictions for only the "never-count" offenses specifically listed in section 4A1.2(c)(2). *See* U.S. Sentencing Guidelines Manual § 4A1.2(c)(2).

⁶³. "Illicit Drug Use" refers to use during the year prior to the instant offense. Missing values are counted as "No Illicit Drug Use."

Alcohol Problem⁶⁴														
No Alcohol Problem	14,274	96.2	8,619	97.3	2,391	95.7	418	90.9	2,846	93.8	2,941	91.3	10,163	87.0
Alcohol Problem	572	3.8	235	2.7	108‡	4.3	42‡	9.1	187	6.2	279	8.7	1,520	13.0
Employment Status⁶⁵														
Unemployed	2,301	15.5	1,175	13.3	461	18.4	44‡	9.5	622	20.5	447	13.9	3,778	32.3
Employed	12,544	84.5	1,175	86.7	2,038	81.6	416	90.5	2,411	79.5	2,774	86.1	7,905	67.7
Marital Status														
Never Married	4,004	27.0	2,131	24.1	842	33.7	131	28.5	900	29.7	896	27.8	4,688	40.1
Legal Marriage	6,509	43.8	4,253	48.0	848	33.9	204	44.3	1,204	39.7	1,277	39.7	2,694	23.1
Divorced	1,975	13.3	1,079	12.2	309	12.4	56‡	12.1	532	17.6	380	11.8	1,897	16.2
Other ⁶⁶	2,357	15.9	1,391	15.7	501	20.0	70‡	15.1	396	13.1	667	20.7	2,404	20.6

‡ Indicates fewer than 10 unweighted sample subjects. Findings may not be statistically significant.

Table 3 shows that the prevalence of mental illness⁶⁷ varies little across the CHC I groups, comprising about 9.5% of the offenders in each group. A slightly higher percentage of mental illness (11.6%) is observed for CHC II through VI offenders. All proposed first offender groups have the highest rates of high school graduation⁶⁸ (roughly 72% to 85%). Only for Group C (84.9%), however, is the rate comparable to that for the adult U.S. citizen population in the early 1990s.⁶⁹ High school graduation rates are somewhat lower for other CHC I offenders (62% to 67%). The high school graduation rates are lowest for CHC II through VI offenders, at 55.8%. Group A first offenders are slightly more likely to have financial dependents (61.6%) than all of the other offender groups shown, while CHC II through VI offenders are least likely to have financial dependents (47.6%).

64. "Alcohol Problem" is defined as more than one past conviction for DUI or public drunkenness, or current, planned, or unsuccessfully completed treatment, or the offender's admission of a problem.

65. "Employment Status" refers to the year prior to the instant offense. "Employed" includes alternative forms of employment. "Unemployed" includes missing values.

66. "Other" marital status includes "Co-habitation," "Widowed," and "Separated."

67. What constitutes "mental illness" may vary considerably across jurisdictions. Nevertheless, we chose to use the information provided in the pre-sentence report as the best measure we had available to make this determination.

68. High school graduation rate is defined as the sum of the percents for "High School," "Some College," and "College Graduate" attainment in Table 3.

69. The U.S. Census Bureau reports that 82.6% of the U.S. citizen adult population age 25 and older in 1994 (only two years later than the 1992 recidivism sample) had at least graduated high school. Kristin A. Hansen & Amara Bachu, U.S. Dep't of Commerce, The Foreign Born Population: 1994, at 4 (1995), available at <http://www.census.gov/prod/1/pop/p20-486.pdf>.

TABLE 3:⁷⁰ SOCIAL AND PERSONAL CHARACTERISTICS OF OFFENDERS BY CRIMINAL HISTORY CATEGORY AND CRIMINAL HISTORY POINTS WITH DETAILS FOR ZERO-POINT OFFENDER CATEGORIES RECIDIVISM STUDY 2003

	CRIMINAL HISTORY CATEGORY I										CATEGORIES II – VI			
	ZERO-POINT OFFENDERS													
Social/ Personal Characteristics	Total Zeroes		Group A no arrests		Group B no convictions		Group C never-count convictions ⁷¹		Remaining Zeroes		ONE-POINT OFFENDERS		TWO OR MORE-POINT OFFENDERS	
	N	%	N	%	N	%	N	%	N	%	N	%	N	%
TOTAL	14,845	100.0	8,854	100.0	2,499	100.0	460	100.0	3,032	100.0	3,221	100.0	11,683	100.0
Mental Illness⁷²														
No	13,170	90.4	7,874	90.5	2,201	90.0	416	90.5	2,679	90.3	2,921	91.6	1,097	88.4
Yes	1,407	9.7	832	9.6	244	10.0	44‡	9.5	288	9.7	267	8.4	1,327	11.6
Prior Military Service														
No	12,326	83.0	7,437	84.0	2,166	86.7	371	80.7	2,352	77.6	2,666	82.8	10,053	86.0
Yes	2,520	17.0	1,417	16.0	333	13.3	89‡	19.3	680	22.4	554	17.2	1,630	14.0
Educational Attainment⁷³														
Less Than High School	3,872	26.2	1,961	22.2	703	28.2	70‡	15.1	1,139	37.8	1,066	33.1	5,122	44.1
High School	5,820	39.4	3,541	40.1	987	39.7	230	50.1	1,062	35.3	1,128	35.0	4,366	37.6
Some College	3,396	23.0	2,122	24.1	597	24.0	103‡	22.3	575	19.1	835	25.9	1,758	15.1
College Graduate	1,691	11.4	1,196	13.6	203	8.1	57‡	12.5	235	7.8	192	6.0	362	3.1
Financial Dependents⁷⁴														
0	5,729	40.6	3,261	38.4	996	43.0	200	43.6	1,272	44.9	1,336	43.3	5,599	52.4
01 – 04	7,827	55.5	4,900	57.7	1,247	53.8	249	54.2	1,431	50.5	1,637	53.1	4,653	43.5
05 – 10	544	3.9	329	3.9	75‡	3.2	10‡	2.3	129	4.6	110‡	3.6	442	4.1
‡ Indicates fewer than 10 unweighted sample subjects. Findings may not be statistically significant.														

B. Instant Offense and Sentence Characteristics

Tables 4 and 5 show instant offense characteristics for the first offender groups and others sentenced in 1992. Table 4 shows that drug trafficking offenses represent the largest single percentage of all offense types for all groups shown. First offenders' and the other

70. FY 1992 Recidivism Sample, *supra* note 40. Missing data are excluded, unless specified.

71. This column refers to prior arrests with no dispositions and convictions for only the "never-count" offenses specifically listed in section 4A1.2(c)(2). See U.S. Sentencing Guidelines Manual § 4A1.2(c)(2) (2002).

72. "Mental Illness" is defined as any mention of a mental illness, regardless of whether the claim was verified by a doctor. Alcohol and illicit drug abuse/addiction were excluded.

73. "Educational Attainment" is at the time of the instant offense.

74. "Financial Dependents" refers to the number of individuals to whom the offender provided financial support during the year prior to the instant offense.

CHC I offenders' federal crimes, however, are disproportionately more likely to be comprised of fraud and theft offenses, and disproportionately less likely to be comprised of weapons or robbery offenses, than are the offenses of defendants in CHC II through VI.

TABLE 4:⁷⁵ INSTANT OFFENSE CHARACTERISTICS FOR OFFENDERS BY CRIMINAL HISTORY CATEGORY AND CRIMINAL HISTORY POINTS WITH DETAILS FOR ZERO-POINT OFFENDER CATEGORIES
RECIDIVISM STUDY 2003

	CRIMINAL HISTORY CATEGORY I										CATEGORIES II – VI			
	ZERO-POINT OFFENDERS										ONE-POINT OFFENDERS			
Instant Offense	Total Zeroes		Group A no arrests		Group B no convictions ⁷⁶		Group C never-count convictions ⁷⁶		Remaining Zeroes				TWO OR MORE-POINT OFFENDERS	
Characteristics	N	%	N	%	N	%	N	%	N	%	N	%	N	%
TOTAL	14,845	100.0	8,854	100.0	2,499	100.0	460	100.0	3,032	100.0	3,221	100.0	11,683	100.0
Primary Sentencing Guideline														
§2D1.1 (<i>Drug Trafficking</i>)	4,903	33.2	2,301	26.1	1,228	49.6	148	33.0	1,227	40.5	1,413	44.0	4,732	40.9
§2F1.1 (<i>Fraud</i>)	3,120	21.1	2,229	25.3	359	14.5	68†	15.1	465	15.3	486	15.1	1,326	11.5
§2B1.1 (<i>Theft</i>)	2,578	17.5	2,049	23.2	217	8.8	82†	18.2	230	7.6	426	13.3	640	5.5
§2K2.1 (<i>Weapon</i>)	256	1.7	87†	1.0	57†	2.3	23†	5.0	89†	2.9	122	3.8	1,650	14.2
§2B3.1 (<i>Robbery</i>)	316	2.1	115	1.3	84†	3.4	12†	2.7	105†	3.5	94†	2.9	1,081	9.3
Dangerous Instant Offense⁷⁷														
Yes	1,941	13.1	824	9.3	461	18.4	45†	9.8	611	20.2	713	22.1	3,847	32.9
Culpability Criteria⁷⁸														
1. No Violence or Weapon	12,925	87.1	8,051	90.9	2,028	81.1	404	87.9	2,442	80.5	2,552	79.2	7,908	67.7
2. No Bodily Injury	14,749	99.3	8,833	99.8	2,457	98.3	460	100.0	2,999	98.9	3,200	99.4	11,498	98.4
3. Mitigating Role	13,599	91.6	8,097	91.4	2,276	91.1	448	97.3	2,779	91.6	2,898	90.0	10,629	91.0
4. Acceptance of Responsibility	12,317	83.0	7,540	85.2	2,028	81.1	364	79.1	2,386	78.7	2,624	81.5	8,775	75.1

75. FY 1992 Recidivism Sample, *supra* note 40. Missing data are excluded, unless specified.

76. This column refers to prior arrests with no dispositions and convictions for only the “never-count” offenses specifically listed in section 4A1.2(c)(2). See U.S. Sentencing Guidelines Manual § 4A1.2(c)(2).

77. “Dangerous Instant Offense” indicates whether an offender, during the commission of their instant offense, either threatened or caused actual violence or injury and/or a weapon was involved. Missing values are counted as “No” dangerousness present.

78. U.S. Sentencing Guidelines Manual § 5C1.2. The culpability criteria listed here appear as sections 5C1.2(a)(2)-(5), except for the exclusions contained in section 5C1.2(a) and section 5C1.2(a)(1). *Id.*

Meet All Four Above	10,321	69.5	6,521	73.6	1,610	64.4	317	68.9	1,873	61.8	1,990	61.8	5,751	49.2
Culpability														
‡ Indicates fewer than 10 unweighted sample subjects. Findings may not be statistically significant.														

During the data collection, the pre-sentence descriptions of prior offenses were examined to identify “dangerous” conduct, defined as weapon involvement, actual or threatened violence, injury to a victim, or threat of injury to a victim. Offenders in Group A and Group C have substantially lower percentages of dangerous instant offense conduct (9.3% and 9.8%, respectively) than the other offenders in Table 4. A striking difference exists for CHC II through VI offenders, of whom almost one-third (32.9%) exhibited some form of dangerous conduct in the instant offense.

The bottom panel in Table 4 describes all offender groups with regard to four of the five so-called “low culpability” criteria of section 5C1.2.⁷⁹ These four criteria include:

- no violence or weapon involvement in the instant offense;⁸⁰
- no bodily injury to any person as a result of the instant offense;⁸¹
- the offender played a minimal role in the offense;⁸² and
- the offender cooperated fully with the government.⁸³

Table 4 shows that all four criteria are most frequently (consistently above 60%) met by the offenders in CHC I, and among them, the offenders in Groups A, B, and C have the highest rates of meeting the criteria (73.6%, 64.4%, and 68.9%, respectively). In contrast, only half (49.2%) of CHC II through VI offenders meet all four low culpability criteria. Consistent with the information on instant offense dangerousness above, the reason CHC II through VI offenders most often fail the culpability criteria determination is that their offenses involve the presence of weapons or violence. These group-specific culpability levels receive further consideration below in discussing the formulation of alternative sentencing options for first offenders.

79. The section 5C1.2 culpability criteria are used when applying sentencing guidelines to drug trafficking offenders to identify first-time nonviolent individuals who, because of reduced culpability, qualify for a sentencing reduction; this provision is known as the “safety valve.” *See id.* The distribution of these culpability criteria among the proposed first offender groups is relevant as potential conditioning criteria for alternative first offender sentencing options discussed below. Note that in this analysis, one of the five section 5C1.2 criteria is dropped in Table 4. The omitted criterion requires that “the defendant does not have more than one criminal history point, as determined under the sentencing guidelines.” *See id.* § 5C1.2(a)(1). Only those offenders in CHC I meet this criteria.

80. *Id.* § 5C1.2(a)(2).

81. *Id.* § 5C1.2(a)(3).

82. *Id.* § 5C1.2(a)(4).

83. *Id.* § 5C1.2(a)(5).

TABLE 5:⁸⁴ SENTENCE CHARACTERISTICS FOR OFFENDERS BY CRIMINAL HISTORY CATEGORY AND CRIMINAL HISTORY POINTS WITH DETAILS FOR ZERO-POINT OFFENDER CATEGORIES
RECIDIVISM STUDY 2003

	CRIMINAL HISTORY CATEGORY I												CATEGORIES II – VI	
	ZERO-POINT OFFENDERS										ONE-POINT OFFENDERS		TWO OR MORE-POINT OFFENDERS	
Sentence Characteristics	Total Zeroes		Group A <i>No arrests</i>		Group B <i>no convictions</i>		Group C <i>never-count convictions</i>		Remaining Zeroes					
	N	%	N	%	N	%	N	%	N	%	N	%		
TOTAL	14,845	100.0	8,854	100.0	2,499	100.0	460	100.0	3,032	100.0	3,221	100.0	11,683	100.0
Type of Sentence ⁸⁵														
Fine Only	134	0.9	121	1.4	0‡	0.0	0‡	0.0	12‡	0.4	12‡	0.4	3‡	0.0
Probation Only	3,646	24.6	2,685	30.3	364	14.6	87‡	18.9	510	16.8	562	17.4	572	4.9
Probation + Alternatives	2,768	18.7	1,894	21.4	340	13.7	121	26.4	413	13.6	486	15.1	542	4.6
Prison + Alternatives	818	5.5	503	5.7	126	5.1	10‡	2.3	178	5.9	168	5.2	392	3.4
Prison	7,467	50.3	3,650	41.2	1,657	66.6	241	52.4	1,919	63.3	1,992	61.9	10,174	87.1
Length of Prison Sentence ⁸⁶														
0	6,560	44.4	4,701	53.3	716	28.8	208	45.3	935	31.0	1,060	33.1	1,117	9.6
01 – 05	1,059	7.2	640	7.3	157	6.3	31‡	6.8	231	7.7	273	8.5	421	3.6
06 – 11	797	5.4	419	4.8	136	5.5	21‡	4.6	220	7.3	241	7.6	800	6.9
12 – 23	1,678	11.3	912	10.3	315	12.6	63‡	13.7	388	12.9	294	9.2	1,770	15.2
24 – 59	2,014	13.6	1,017	11.5	503	20.2	84‡	18.2	409	13.6	451	14.1	2,820	24.2
60 or More	2,674	18.1	1,133	12.8	661	26.6	52‡	11.4	828	27.5	881	27.5	4,704	40.5
Points for Mitigating Role														
0 points	13,537	91.6	8,060	91.4	2,213	89.4	427	95.0	2,837	93.6	2,891	90.1	10,946	94.5
-2 points	879	6.0	527	6.0	199	8.0	23‡	5.0	131	4.3	239	7.5	482	4.2
-3 points	31‡	0.2	10‡	0.1	10‡	0.4	0‡	0.0	10‡	0.4	10‡	0.3	46	0.4
-4 points	330	2.2	221	2.5	54‡	2.2	0‡	0.0	54‡	1.8	70‡	2.2	110	1.0
‡ Indicates fewer than 10 unweighted sample subjects. Findings may not be statistically significant.														

Table 5 shows that the most common type of sentence for all federal offenders is straight prison time (that is, a sentence of prison without resorting to probation or including parole), but the relative frequency

84. FY 1992 Recidivism Sample, *supra* note 40. Missing data are excluded, unless specified.

85. This column refers to prior arrests with no dispositions and convictions for only the “never-count” offenses specifically listed in section 4A1.2(c)(2). See U.S. Sentencing Guidelines Manual § 4A1.2(c)(2).

86. “Type of sentence” refers to the type of sentence given for the offender’s instant offense.

87. “Length of prison sentence” refers to the sentence imposed for the offender’s instant offense, presented in months.

of straight prison time varies by criminal history. Not surprisingly, all offenders in CHC I are less likely (between 41% and 64%) to receive straight prison time than are offenders in CHC II through VI, of whom almost nine of ten offenders (87.1%) receive straight prison time. Within CHC I itself, however, there is considerable variation in the rates and lengths of prison sentences.

- Group A first offenders have the highest rate (30.3%) of probation-only sentences, which is nearly twice the percentage for each of the remaining CHC I groups, and five times higher than the 4.9% of offenders in CHC II through V.
- Fewer than half (41.2%) of Group A first offenders receive a straight prison sentence, which is 26 and 11 percentage points less than that for offender Groups B and C, respectively, who receive such a sentence, 22 percentage points below the remaining CHC I offenders, and less than half of the rate for offenders in CHC II through VI (87.1%).
- More than half (53.3%) of Group A first offenders receive no prison time, followed by Group C first offenders (45.3% of whom receive no prison sentence). Only a small percentage of CHC II through VI offenders received no prison time at all (9.6%).
- Offenders in Group A or Group C are more likely to have prison terms of less than two years (47.8% and 45.8%, respectively) than are other federal offenders. Only approximately one quarter (28.5%) of CHC II through VI offenders receive a prison sentence of two years or less.

Table 5 also indicates that, overall, few offenders receive a mitigating role adjustment. The Federal Sentencing Guidelines currently permit judges to decrease an offender's sentence if she was only a "minimal" or "minor" participant in the offense of conviction.⁸⁸ Such an adjustment exists to permit judges flexibility when they determine that a quantity measurement (in terms of the amount of drugs or the dollar loss) overstates the offender's culpability. Mitigating role rates for offenders in Group A, Group B, and the one-point offenders are similar (at roughly 10%) and somewhat higher than the mitigating role rates for either first offenders in Group C or offenders in CHC II through VI (at roughly 5%).

C. Recidivism and First Offenders

Table 6 shows two-year recidivism rates (as percentages) for the various offender groups. As might be expected, this data clearly shows that the Criminal History Categories do possess some predictive power. First offender Group A has the lowest recidivism rate, at 6.8%. Interestingly, offender Group C exhibits the next lowest incidence of recidivism, with a rate of just 8.8%. Group B first

88. U.S. Sentencing Guidelines Manual § 3B1.2.

offenders have a recidivism rate of 17.2%, which is nearly three times the rate of Group A and nearly twice the rate of Group C. The remaining zero-point offenders and the one-point offenders each have similar recidivism rates, at 21.7% and 22.7% respectively. Category II through VI offenders have the highest two-year recidivism rate, at 36.5%.

TABLE 6:⁸⁹ RECIDIVISM RATES BY CRIMINAL HISTORY CATEGORY AND CRIMINAL HISTORY POINTS WITH DETAILS FOR ZERO-POINT OFFENDER CATEGORIES RECIDIVISM STUDY 2003

		CRIMINAL HISTORY CATEGORY I											CATEGORIES II – VI		
		ZERO-POINT OFFENDERS										ONE-POINT OFFENDERS		TWO OR MORE-POINT OFFENDERS	
	Total Zeroes		Group A <i>no arrests</i>		Group B <i>No convictions</i>		Group C <i>never-count convictions^a</i>		Remaining Zeroes						
	N	%	N	%	N	%	N	%	N	%	N				
TOTAL ^a	12,546	100.0	7,448	100.0	2,089	100.0	416	100.0	2,592	100.0	2,871	100.0	8,906	100.0	
Primary Recidivism Definition ^{a2}															
Did Recidivate	1,465	11.7	508	6.8	359	17.2	36‡	8.8	561	21.7	650	22.7	3,250	36.5	
Did <i>Not</i> Recidivate	11,081	88.3	6,940	93.2	1,730	82.8	380	91.2	2,031	78.3	2,221	77.3	5,656	63.5	
TOTAL ^{a3}	1,465	100.0	508	100.0	359	100.0	36	100.0	561	100.0	650	100.0	3,250	100.0	
Recidivating Offense Type															
Probation Revocation	395	27.0	139	27.4	86‡	23.8	24‡	66.7	146	26.1	104‡	16.0	602	18.7	
Supervision Revocation	202	13.8	75‡	14.8	33‡	9.2	0‡	0.0	94‡	16.8	94‡	14.5	698	21.6	
Fraud	101‡	6.9	44‡	8.6	35‡	9.7	0‡	0.0	23‡	4.0	24‡	3.7	130	4.0	
Drug Possession	78‡	5.4	45‡	8.9	10‡	2.9	0‡	0.0	23‡	4.0	33‡	5.1	187	5.8	
Drug Trafficking	107‡	7.3	10‡	2.1	54‡	15.1	0‡	0.0	42‡	7.5	131	20.1	231	7.2	
Larceny	101‡	6.9	33‡	6.5	33‡	9.2	0‡	0.0	35‡	6.2	45‡	7.0	267	8.3	
DUI	86‡	5.8	21‡	4.1	21‡	5.8	0‡	0.0	43‡	7.8	44‡	6.8	133	4.1	
Serious Violent Offense ^{a141}		9.6	10‡	2.0	42‡	11.7	0‡	0.0	89‡	15.8	63‡	9.7	424	13.1	
Other	254	17.3	130	25.6	45‡	12.6	12‡	33.3	66‡	11.8	111‡	17.1	533	17.2	
‡ Indicates fewer than 10 unweighted sample subjects. Findings may not be statistically significant.															

89. FY 1992 Recidivism Sample, *supra* note 40. Missing data are excluded, unless specified.

90. This column refers to prior arrests with no dispositions and convictions for only the “never-count” offenses specifically listed in section 4A1.2(c)(2). See U.S. Sentencing Guidelines Manual § 4A1.2(c)(2).

91. “Total” refers to the number of offenders with a twenty-four month period at risk of recidivating following either initiation of probation (for offenders receiving probation-only sentences) or release from confinement (for those offenders receiving confinement sentences).

92. “Primary Recidivism Definition” is based on offender’s re-arrest, including supervised release/probation violations, re-arrest, or re-conviction.

93. Number of offenders who recidivated during the twenty-four month recidivism follow-up period following either initiation of probation (for offenders receiving probation-only sentences) or release from confinement (for those offenders receiving confinement sentences).

94. “Serious Violent Offense” includes re-arrests for the following offense types: homicide, kidnapping, robbery, sexual assault, aggravated assault, domestic violence, and weapon offenses.

Table 6 also shows the most common reasons cited for recidivism among the different groups. The most common recidivism reason in all groups consists of revocations of either probation or post-prison supervision. After revocations, and with the exception of driving under the influence of drugs or alcohol ("DUI"), the pattern of the most common recidivating offenses is not that different from the instant offense composition shown in Table 4. Serious violent recidivism is uniquely low in Group A, at only 2.0%. Because of small sample sizes, however, the recidivism rate of zero for Group C cannot itself be cited, but its small value suggests that Group C offenders might have a low rate of violent recidivism as well.

It seems clear from the pattern of recidivism rates shown in Table 6, that first offender Group A demonstrates the least likelihood of returning to crime within two years after returning to the community. One might infer from this that either Group A first offenders are not committed to a life of crime (neither before nor after their instant offense) or that they are easily deterred from any future crime by the non-prison sanctions that most of them receive (more than half (53.3%) of Group A offenders receive no prison time). However, additional research is needed to determine whether this conclusion stands up over time.

D. Prior Arrests Not Resulting in a Conviction

The information presented in Table 6 is more difficult to explain with respect to the proposed first offender Group B. These offenders have prior arrests but no prior convictions, yet they have a recidivism rate nearly three times that for the first offender Group A (17.2% compared to 6.8%, respectively). This seems to support the adage "where there's smoke, there's fire." In other words, the existence of a number of arrests may indicate that an individual has engaged in criminal behavior that either has not been fully detected or for which there exists insufficient evidence to mount a prosecution. A number of difficulties arise in any attempt to use arrest data, however. First, and certainly foremost, an arrest is not tantamount to a conviction. Thus, it seems unfair to use arrest data in determining an offender's criminal history score. Moreover, the reliability of such data is often suspect. While adequate records are generally kept of actual convictions, the same cannot be said for arrests. Thus, the inclusion of such information may lead to unwarranted disparities within the system. In any event, this apparent anomaly warrants further analysis regarding the nature of the Group B prior arrests that did not result in convictions.

Further, it is often difficult, if not impossible, to determine the alleged reason for an arrest that is without a resulting conviction. For example, an arrest for drug use or a violent crime may correspond highly with a likelihood of future criminality, while an arrest for

shoplifting or driving under the influence may not. Inclusion of prior arrests in the calculation of a criminal history score may be more tempting if the nature of the arrest itself could be uniformly and reliably determined. Of course, such a suggestion presupposes that the arrest was itself justified. The American criminal justice system presumes innocence, not guilt. It is therefore abhorrent to base punishment merely upon the existence of an arrest, without more. What may be intriguing for purposes of designing a model may be repugnant for the purposes of devising public policy.

Nevertheless, it cannot be said that arrest data are entirely irrelevant. If, as a policy matter, the Criminal History Categories are being used solely as a means of predicting recidivism (or even culpability, for that matter), then the data strongly suggest that arrests—even without convictions—ought to be taken into account if the intent is to build an accurate model. Similarly, the existence of an arrest indicates some familiarity with the criminal justice system on the part of the arrestee. Nevertheless, the mere fact of an arrest, without a corresponding conviction, may for good reason give policy makers pause when deciding whether to include arrest data when calculating an offender's criminal history. As a policy matter, indeed as a matter of fundamental fairness, it is appropriate to differentiate between arrests and convictions. Moreover, the ability to predict future criminal behavior does not suggest an ability to predict future serious criminal activity. If the repeat offense is relatively minor, problems may exist with using past actions to predict future behavior. A need thus exists to distinguish between serious criminal activity, and activity that, while criminal, is nevertheless minor.⁹⁵

It must be recognized, however, that to exclude arrests would diminish the predictive power of a model purporting to predict future criminality. Exclusion of such data also discounts an arrestee's familiarity with the criminal justice system, which is important because familiarity with the criminal justice system may bear a role in assessing culpability. At least in terms of offenders' likelihood to engage in future criminal conduct, it makes little sense to separate those offenders who have only arrests from those who have convictions. Legitimate concerns about fundamental fairness and due process, however, counsel that the inclusion of arrests as a means of

95. At this point, the research is designed to determine who is likely to recidivate, but does not distinguish between serious and less serious offenses. It might be argued that minor probation violations, while criminal, ought not to be used for purposes of criminal history scoring. Similarly, if the crimes being predicted are only relatively minor offenses, it could be argued that the criminal history category score has little value. These arguments certainly have merit. Efforts to distinguish among the various crimes, and scoring them according to their perceived seriousness, would be worthwhile to any endeavor to use criminal history to predict future criminality.

calculating criminal history smacks of unfairness. Doubtless, a line, whether empirically supportable or not, can readily be drawn between the existence of actual convictions and mere arrests.

TABLE 7:⁹⁶ NUMBER OF PRIOR ARRESTS WITHOUT SUBSEQUENT CONVICTION BY CRIMINAL HISTORY CATEGORY I WITH DETAILS FOR ZERO-POINT OFFENDER CATEGORIES RECIDIVISM STUDY 2003

	CRIMINAL HISTORY CATEGORY I											
	ZERO-POINT OFFENDERS										ONE-POINT OFFENDERS	
Offender's Number of Prior Arrests Without Conviction ⁹⁷	Total Zeroes		Group A <i>no arrests</i>		Group B <i>no convictions</i>		Group C <i>never-count convictions*</i>		Remaining Zeroes			
	N	%	N	%	N	%	N	%	N	%	N	%
TOTAL	14,845	100.0	8,854	100.0	2,499	100.0	460	100.0	3,032	100.0	3,221	100.0
0 Arrests without convictions	10,710	72.1	8,854	100.0	0‡	0.0	303	65.9	1,553	51.2	1,712	53.1
1 Arrest without conviction	2,265	15.3	By definition, Group A offenders have no prior arrests.		1,465	58.6	124	26.9	677	22.3	685	21.3
2 Arrests without convictions	992	6.7			570	22.8	23‡	4.9	400	13.2	363	11.3
3 Arrests without convictions	387	2.6			207	8.3	10‡	2.3	169	5.6	183	5.7
4-9 Arrests without convictions	469	3.2			257	10.3	0‡	0.0	212	7.0	225	7.0
10+ Arrests without convictions	21‡	0.1			0‡	0.0	0‡	0.0	21‡	0.7	53‡	1.6
‡ Indicates fewer than 10 unweighted sample subjects. Findings may not be statistically significant.												

Table 7⁹⁹ presents information on the arrest histories of citizen federal offenders in fiscal year 1992. The Table focuses solely on arrests that do not result in convictions, and thus provides an indicator of offender involvement with the criminal justice system that is not

96. FY 1992 Recidivism Sample, *supra* note 40. Missing data are excluded, unless specified.

97. These prior arrests did not result in a conviction (i.e., these arrestees were either found not guilty, the charges were dismissed, pending, on warrant status, or disposition records could not be located by the probation officer).

98. Group C offenders have prior convictions only for "never count" minor offenses specifically listed in section 4A1.2(c)(2). See U.S. Sentencing Guidelines Manual § 4A1.2(c)(2) (2002).

99. Offenders in CHC II through VI do not appear in the Table because arrest-only data were recorded exclusively for offenders in CHC I.

captured by the Guidelines' criminal history offense conviction measures. Table 7 shows that the lowest rates of arrest-only experience are for Group A (with no recorded prior arrests at all) and Group C (with nearly two-thirds (65.9%) having no arrests without convictions). The differences among Group A, B, and C offenders are summarized in the sidebar table below. It shows that 41.4% of Group B offenders had two or more arrests without convictions. Approximately half of these (18.6% of all Group B offenders) had three or more arrests without convictions. Comparing this information with the overall data in Table 7, it is clear that both of these rates are higher than those for the remaining zeroes group and the one-point offender group. For these two groups, about one in four offenders had two or more arrests without convictions, while roughly one in eight had three or more arrests without convictions.

Detail of Data in Table 7	% With Two or More Arrests without convictions	% With Three or More Arrests without convictions
Group A	0.0	0.0
Group B	41.4	18.6
Group C	7.2	2.3
Remaining Zeroes	26.5	13.3
One-Point	25.6	14.3

The data in Table 7 indicate that Group B offenders have a more extensive prior arrest history than do Group A or Group C offenders. The correlation between arrest histories and recidivism rates is the subject of Table 8, which indicates that the more an offender is arrested, the more likely he or she is to recidivate. The Table examines the two first offender groups without any prior convictions: Group A and Group B. Group A offenders, by definition, have no prior arrests and, obviously, no prior convictions. Group B offenders, by definition, have at least one prior arrest and no prior convictions. The Table shows a strong correlation between arrests and recidivism rates. Even in the absence of prior convictions, the greater the number of arrests, the higher the recidivism rate. Offenders with no prior arrests have a two-year recidivism rate of 6.8%. Offenders with two or more prior arrests without a conviction have a recidivism rate of 23.4%, which is nearly twice as large as the 13.3% rate for offenders with only one prior arrest that did not lead to a conviction. The recidivism rate of Group B offenders approaches that of Group C

offenders. In sum, there is a direct association between the number of prior arrests that did not result in a conviction and recidivism risk.

TABLE 8:¹⁰⁰ IMPACT OF PRIOR ARREST HISTORY ON RECIDIVISM RATES FOR OFFENDERS WITH NO PRIOR CONVICTIONS (FIRST OFFENDER GROUP A AND GROUP B)

Offender's Number of Prior Arrests Without Convictions	Two-Year Recidivism Rates
Group A	
0 arrests without conviction	6.8%
Group B	
1 arrest without conviction	13.2%
2 or more arrests without convictions	23.2%

Table 9 takes an even more exacting look at the arrest history of offenders by examining the types of offenses for which there was an arrest but no conviction. The prior arrest-only events for Group B first offenders contain a large proportion of drug trafficking, drug possession, violence, and theft offenses: 40% of all prior non-conviction arrests are for these types of offenses. In comparison, Group C first offenders have relatively few prior non-conviction arrests for drugs, violence, and theft offenses: only 18.7% of all non-conviction prior arrests for Group C are of these types. Once again, the criminal histories of Group B offenders are distinctively different from the histories of the proposed Group A or Group C first-time offenders. Group B offenders have more substantial criminal histories, which means that they inflict a greater cost on society through their criminal behavior.

100. FY 1992 Recidivism Sample, *supra* note 40.

TABLE 9:¹⁰¹ TYPE OF COUNTS THAT DID NOT END IN A CONVICTION¹⁰² BY CRIMINAL HISTORY CATEGORY I WITH DETAILS FOR ZERO-POINT OFFENDER CATEGORIES RECIDIVISM STUDY 2003

	CRIMINAL HISTORY CATEGORY I											
	ZERO-POINT OFFENDERS										ONE-POINT OFFENDERS	
Type of Counts that Did Not End in a Conviction	Total Zeroes		Group A <i>no arrests</i>		Group B <i>no convictions</i>		Group C <i>never-count convictions</i> ¹⁰³		Remaining Zeroes			
	N	%	N	%	N	%	N	%	N	%		
TOTAL	10,280	100.0	0	100.0	5,935	100.0	233	100.0	4,112	100.0	4,647	100.0
Drug Trafficking												
Cocaine	309	3.0			265	4.5	0‡	0.0	44‡	1.1	99‡	2.1
Crack	87‡	0.8			77‡	1.3	0‡	0.0	10‡	0.3	23‡	0.5
Marijuana	171	1.7			108‡	1.8	0‡	0.0	63‡	1.5	112‡	2.4
Other	360	3.5			253	4.3	10‡	4.5	96‡	2.3	211	4.6
Drug Possession												
Cocaine	224	2.2	By definition, Group A offenders have no prior arrests nor counts.		150	2.5	0‡	0.0	73‡	1.8	105‡	2.3
Marijuana	436	4.2			229	3.8	12‡	5.2	195	4.7	153	3.3
Other	361	3.5			200	3.4	0‡	0.0	161	3.9	105‡	2.3
Assault												
Battery	370	3.6			161	2.7	21‡	9.0	188	4.6	108‡	2.3
Aggravated	234	2.3			117	2.0	0‡	0.0	117	2.8	117	2.5
Simple	63‡	0.6			42‡	0.7	0‡	0.0	21‡	0.5	42‡	0.9
Other	263	2.6			164	2.8	0‡	0.0	99‡	2.4	150	3.2
Fraud												
Insufficient Check	354	3.4			278	4.7	33‡	14.2	44‡	1.1	403	8.7
Other	295	2.9			230	3.9	0‡	0.0	65‡	1.6	120	2.6
Larceny												
Grand	162	1.6			110‡	1.8	0‡	0.0	52‡	1.3	117	2.5
Petty	181	1.8			113	1.9	0‡	0.0	68‡	1.6	91‡	1.9
Shoplifting	166	1.6			101‡	1.7	0‡	0.0	65‡	1.6	32‡	0.7
Burglary	208	2.0			131	2.2	0‡	0.0	77‡	1.9	89‡	1.9

101. *Id.* Missing data are excluded, unless specified.

102. The disposition of these counts was either dismissed, pending, on warrant status, could not be located by the probation officer, the arrestee was found not guilty, or anything else other than guilty. The "N" does not represent people, cases, or arrests, but rather the number of counts for each variable.

103. This refers to prior arrests with no dispositions and convictions for only the "never-count" offenses specifically listed in section 4A1.2(c)(2). See U.S. Sentencing Guidelines Manual § 4A1.2(c)(2).

Other	345	3.4		153	2.6	0‡	0.0	192	4.7	239	5.1
Traffic			<i>By definition, Group A offenders have no prior arrests nor counts</i>								
DUI	441	4.3		225	3.8	0‡	0.0	216	5.3	204	4.4
Reckless Driving	200	1.9		155	2.6	23‡	9.7	23‡	0.5	21‡	0.5
Driving without	368	3.6		131	2.2	23‡	9.7	215	5.2	164	3.5
Other	623	6.1		370	6.2	0‡	0.0	253	6.2	248	5.3
Other											
Failure to	426	4.1		99‡	1.7	0‡	0.0	326	7.9	245	5.3
All Other Offenses	3,633	35.3		2,073	34.9	111‡	47.7	1,449	35.2	1,449	31.2
‡ Indicates fewer than 10 unweighted sample subjects. Findings may not be statistically significant.											

One final level of detail for the non-conviction arrests is presented in Table 10, which reports reasons why prior arrests did not subsequently result in convictions. Relatively few of the arrests in Group B or Group C resulted in a “not guilty” disposition: only 1.4% for first offender Group B and none for first offender Group C. The most common reason for no conviction was that the charges were dismissed or otherwise not prosecuted. For Group B, 45.4% of non-conviction arrests, and for Group C, 69.8% of non-conviction arrests, did not lead to a conviction because the charges were dismissed.

A seemingly fundamental difference between the prior arrests of Group B and Group C offenders relates to pending charges. For Group B, 26.5% of the arrests were pending prosecution at the time of sentence for the instant offense, and for an additional 15.7% a warrant had been issued. A much smaller percentage of Group C first offender arrests (12.8%) had prosecutions pending at the time of sentence for the instant offense, and the sample did not indicate that any Group C arrests required the issuance of a warrant. The presence of higher levels of pending dispositions and issued warrants may suggest that some of these arrests may subsequently turn into convictions, thus providing a possible explanation for the higher recidivism rates of Group B compared to Group C.

An increased culpability of Group B offenders, emanating from the observed increased likelihood of pending and warranted arrests cited above, is further supported by information presented in the bottom lines of Table 10. These data report on the offenders’ prior non-conviction arrests in terms of their dangerousness, defined as arrests for offense conduct that involved actual or threatened violence, injury to victim, or a weapon. For Group B, a total of 16.8% of prior non-conviction arrests could be categorized as dangerous, while none of the Group C prior arrests in the sample could be so categorized.

TABLE 10:¹⁰⁴ PRIOR ARREST CHARACTERISTICS¹⁰⁵ BY CRIMINAL HISTORY CATEGORY I WITH DETAILS FOR ZERO-POINT OFFENDER CATEGORIES RECIDIVISM STUDY 2003

	CRIMINAL HISTORY CATEGORY I											
	ZERO-POINT OFFENDERS										ONE-POINT OFFENDERS	
	Total Zeroes		Group A <i>no arrests</i>		Group B <i>no convictions</i>		Group C <i>never-count convictions¹⁰⁶</i>		Remaining Zeroes			
Prior Arrest Characteristics	N	%	N	%	N	%	N	%	N	%	N	%
TOTAL	8,059	100.0	0	100.0	4,545	100.0	200	100.0	3,313	100.0	3,723	100.0
Disposition of Arrest												
Not Guilty	187	2.5			56‡	1.4	0‡	0.0	131	4.0	75‡	2.0
Dismissed	3,312	44.8			1,780	45.4	133	69.8	1,400	42.7	1,625	44.2
Pending	1,927	26.1	Group A		1,037	26.5	24‡	12.8	866	26.4	1,208	32.8
Warrant	781	10.6	Offenders		617	15.7	0‡	0.0	164	5.0	42‡	1.1
P.O. Not Find Disposition Record	1,067	14.4	Have No Prior		369	9.4	33‡	17.4	665	20.2	721	19.6
Other	119	1.6	Arrests/Counts		63‡	1.6	0‡	0.0	56‡	1.7	10‡	0.3
Dangerous Prior Arrest Conduct ¹⁰⁷												
Yes	1,176	14.6			764	16.8	0‡	0.0	412	12.4	204	5.5
‡ Indicates fewer than 10 unweighted sample subjects. Findings may not be statistically significant.												

The group-specific recidivism rates in Table 6, along with descriptions of prior arrest data for the various offender groups in Tables 7 through 10, indicate that Group B first offenders have greater involvement with the criminal justice system than Group A first offenders, both before (as indicated by the arrests) and after (as indicated by recidivism rates) their federal instant offense sentencing. Although Group C first offenders have prior convictions, such convictions by definition are for only minor traffic and public order offenses, which are excluded for purposes of calculating criminal

104. FY 1992 Recidivism Sample, *supra* note 40. Missing data are excluded, unless specified.

105. "Prior arrests" refers to those that did not result in a conviction. These arrestees were either found not guilty, or the arrests were dismissed, were pending, on warrant status, or disposition records could not be located by the probation officer. The "N" represents the total number of prior arrests not leading to convictions.

106. Refers to prior arrests with no dispositions and convictions for only the "never-count" offenses specifically listed in section 4A1.2(c)(2). See U.S. Sentencing Guidelines Manual § 4A1.2(c)(2) (2002).

107. "Dangerousness" indicates whether offenders in the commission of their prior crimes either threatened or caused actual violence or injury to a victim (or victims) and/or whether a weapon was involved in the commission of the offense. Missing values are counted as "No" dangerousness present.

history points. The data indicate that the minor severity of Group C's convictions, coupled with their limited prior arrest history and reduced recidivism rates, place them in an intermediate position between Group A and Group B in terms of both their culpability and likelihood to recidivate.

E. Noncitizen First Offenders and Noncitizen Recidivism Rates

The relatively high percentage of noncitizen offenders processed in the federal criminal justice system presents some especially vexing issues. The citizenship status of offenders is significant for a number of reasons. Most importantly, for purposes of this analysis, it is often difficult, if not impossible, to determine the prior criminal record of a noncitizen. While it is sometimes possible to gather information from a foreign jurisdiction, or even as a result of self-reported criminal conduct, such information is neither sufficiently reliable, nor uniform, to serve as an appropriate basis for determining an offender's criminal history. Practicality, however, suggests that the difficulty in obtaining this information for noncitizen offenders means that such information ought to be excluded. Yet, ignoring criminal history for this particular group seems unfair to citizen offenders. In light of improved methods of record keeping and collection, it may be possible in the not-too-distant future to obtain adequate criminal history information from, in particular, Canada and Mexico.

As described in the data and methods section, the Commission's Intensive Study Sample for fiscal year 1995 offenders and its 2003 recidivism supplement allow for a citizenship comparison of offenders with no prior convictions and for the remaining CHC groups.¹⁰⁸ The 1995 sample also provides recidivism rates for citizens and noncitizens for these groups.¹⁰⁹ Because information on arrests prior to the instant offense is not available in the 1995 datafile, a disaggregation by proposed first offender grouping is not possible. Consequently, Group A and Group B are combined into a "no prior conviction" category, and Group C and the remaining offenders with zero points are combined into a "with prior conviction" category.

The distribution of citizenship status in fiscal year 1995 is shown at the top of Table 11. Overall, noncitizens comprised 24.2% of all offenders sentenced. Noncitizens were proportionally overrepresented among offenders with zero criminal history points, comprising 29.8% of all zero-point offenders, and 33.7% of offenders with zero points and no prior convictions.¹¹⁰ If, therefore, a first offender group were defined as those defendants with no prior

108. See *supra* Part II.

109. See FY 1995 ISS Sample, *supra* note 51.

110. Interestingly, while noncitizens are proportionally over-represented among offenders with zero criminal history points, among zero-point offenders with prior convictions, noncitizens were under-represented.

convictions (i.e., either Group A or Group B), then nearly one-third of that group could be expected to be noncitizens. The analysis suggests that the one-third estimate is a lower bound for the proportion of noncitizens in Group A and Group B. Based on the fact that the proportion of noncitizens generally declines among higher CHCs, the proportion of noncitizens in Group A (those without any prior arrests) may be even greater than one-third and potentially affected by a first offender definition targeting offenders with no prior arrests.

The bottom panel of Table 11 shows the two-year recidivism rates for citizens and noncitizens by the CHCs. Across all CHCs (the first data column of Table 11), the recidivism rate for citizens is higher than for noncitizens (22.8% versus 17.1%, respectively). The lower noncitizen recidivism rate is expected because noncitizens are usually deported to their native countries after completing their criminal sentences. When criminal offenses occur outside of the United States, subsequent offenses cannot be recorded in the NCIC RAP sheets. What is unexpected is that nearly 20% of noncitizen offenders were back in the U.S. recidivating within the two year recidivism follow-up period.

The comparison of recidivism rates for citizens and noncitizens presented in Table 11 finds different patterns. For citizens, the recidivism rates increase for each higher Criminal History Category, from a low of 7.8% when the offender has no prior convictions in CHC I, to a high of 41.2% for offenders in CHC II through VI. For noncitizens, this increasing pattern does not occur. The recidivism rate for noncitizens remains at approximately 8% or 9% for all zero-point offenders, jumps to 30% for one-point offenders, and then settles at 23.5% for offenders in CHC II through VI. This disparate pattern of rates by citizenship supports the observation that both prior criminal history and recidivism are measured with considerable error for noncitizens. This error is introduced both because of the inability to verify foreign prior criminal histories and the absence of noncitizen deportees from the United States during the two-year recidivism window.

TABLE 11:¹¹¹ U.S. CITIZEN AND NONCITIZEN FREQUENCIES AND TWO-YEAR RECIDIVISM RATES FOR FISCAL YEAR 1995 INTENSIVE STUDY SAMPLE RECIDIVISM SUPPLEMENT 2003

	TOTAL CRIMINAL HISTORY CATEGORIES I – VI		CRIMINAL HISTORY CATEGORY I								CATEGORIES II – VI	
			ZERO-POINT OFFENDERS						ONE-POINT OFFENDERS		TWO OR MORE-POINT OFFENDERS	
			Total Zeros		No Prior Convictions ¹¹²		With Prior Convictions ¹¹³					
			N	%	N	%	N	%	N	%	N	%
TOTAL ¹¹⁴	37,600	100.0	15,660	100.0	11,940	100.0	3,720	100.0	3,440	100.0	14,860	100.0
Citizenship												
U.S. Citizen	28,500	75.8	11,000	70.2	7,920	66.3	3,080	82.8	2,920	84.9	12,040	81.0
Noncitizen	9,100	24.2	4,660	29.8	4,020	33.7	640	17.2	520	15.1	2,820	19.0
TOTAL ¹¹⁵	21,440	100.0	12,260	100.0	9,440	100.0	2,820	100.0	2,700	100.0	9,200	100.0
Primary Recidivism Definition ¹¹⁶												
U.S. Citizens												
Did Recidivate	4,540	22.8	840	9.6	500	7.8	340	14.7	640	27.8	2,800	41.3
Did <i>Not</i> Recidivate	15,340	77.2	7,920	90.4	5,940	92.4	1,980	85.3	1,660	72.2	3,980	58.7
Noncitizens												
Did Recidivate	1,200	17.1	300	8.7	260	8.8	40	8.0	120	30.0	540	23.5
Did <i>Not</i> Recidivate	5,840	82.9	3,160	91.3	2,700	91.2	460	92.0	280	70.0	1,760	76.5

Nonetheless, the information in Table 11 shows that noncitizens are likely to comprise a considerable percentage of any first offender group. Moreover, as calculated by the Guidelines' criminal history measures, noncitizen offenders with zero criminal history points have

111. FY 1995 ISS Sample, *supra* note 51. Missing data are excluded, unless specified.

112. For the Commission's ISS and its recidivism supplement, information is not available for arrests without dispositions prior to the instant offense. Therefore, the category for "No Prior Convictions" includes offenders who fall into both Group A and Group B.

113. "With Prior Convictions" includes Group C offenders as well as the remaining zero category.

114. "Total" equals the weighted number of offenders from the 1995 ISS sample study.

115. Number of offenders who recidivated during the twenty-four month recidivism follow-up period following either initiation of probation (for offenders receiving probation-only sentences) or release from confinement (for those offenders receiving confinement sentences).

116. "Primary Recidivism Definition" is based on offender's re-arrest, including supervised release/probation violations, re-arrest, or re-conviction.

lower recidivism rates than noncitizens with one or more criminal history points.

At this stage, it is appropriate to comment on a comparison of the recidivism rates in Table 11 for the 1995 offender sample with those in Table 6 for the 1992 sample. First, the relationship between recidivism rates and criminal history is maintained: the more extensive the criminal history, the higher the recidivism risk. Second, the citizen recidivism rates computed using the fiscal year 1992 datafile are based on a much larger sample and are therefore more robust than those citizen recidivism rates computed using the fiscal year 1995 datafile presented in Table 11. However, the 1995 datafile is the source for study of noncitizen recidivism rates and their interaction with proposed first offender definitions. Additionally, Table 11 demonstrates that the recidivism rates for noncitizens, calculated only with criminal history data available from offenses committed in the U.S., are difficult to interpret. Assuming that any error related to non-reporting of foreign convictions is random, the data in the Table generally support the documented associations between more extensive prior criminal histories and greater recidivism risk, at least for noncitizen offenders with one or more criminal history points. Noncitizens thus could readily be dropped from any grouping of first offenders.

IV. RECIDIVISM RISK PREDICTION AND FIRST OFFENDERS

Because the Guidelines' criminal history measures serve in significant part as a recidivism risk prediction instrument, a key question is whether a separate provision for first offenders would impact recidivism prediction. After all, if providing a separate criminal history category for first-time offenders, however defined, would weaken the Criminal History Category's predictive power, then change would seem unwise. This part examines the influence that a first offender provision would have on the predictive power of using an offender's criminal history. The analysis assumes that first offenders are set aside for separate guideline treatment while other criminal history groupings remain constant.

Risk prediction research relies on a robust statistical measure of predictive power that has gained wide acceptance in the risk prediction literature,¹¹⁷ despite its limited ability to predict behavior. Although it is hardly perfect, such research is the best available resource that can be used. The original Commission based its creation of the various Criminal History Categories largely on "extant empirical research assessing correlates of recidivism and patterns of

117. See Peter B. Hoffman, *Twenty Years of Operational Use of a Risk Prediction Instrument: The United States Parole Commission's Salient Factor Score*, 22 J. Crim. Just. 477 (1994).

career criminal behavior,”¹¹⁸ concluding that they were sufficiently reliable for use in sentencing. That Commission relied largely upon two well-known predictive devices; namely the United States Parole Commission’s “Salient Factor Score”¹¹⁹ (“SFS”), and the so-called “Inslaw Scale for Selecting Career Criminals for Special Prosecution.”¹²⁰ Using the SFS as its point of departure, the original Commission explained that:

A defendant with a record of prior criminal behavior is more culpable than a first offender and thus deserving of greater punishment. General deterrence of criminal conduct dictates that a clear message be sent to society that repeated criminal behavior will aggravate the need for punishment with each recurrence. To protect the public from further crimes of the particular defendant, the likelihood of recidivism and future criminal behavior must be considered. Repeated criminal behavior is an indicator of a limited likelihood of successful rehabilitation.¹²¹

Although the Commission never conducted independent empirical assessments to determine the validity of the scores, it did commit to “review additional data insofar as they become available in the future” to monitor the Criminal History Categories’ effectiveness in predicting future criminal behavior.¹²² That promise is finally being fulfilled, at least in part, by undertaking a large-scale empirical review to examine the Commission’s establishment of the criminal history categories.

As a consequence, the present Commission has undertaken an effort to examine whether the assigned Criminal History Categories do have any predictive power. To be properly constructed, any measure to predict risk (which is necessarily a difficult task fraught with serious complications) must also be intuitively understandable, with a fixed minimum value representing zero predictive accuracy and a fixed maximum value representing perfect predictive accuracy. The intermediate values represent the level of predictive ability.

One such measure is based on the receiver operator characteristics (“ROC”) curve, which is designated an area under the curve (“AUC”)¹²³ analysis. The AUC is an established technique for measuring a predictive instrument’s (here, criminal history points)

118. U.S. Sentencing Guidelines Manual, ch. 4, pt. A, introductory cmt. (2002).

119. The parole Commission has used the SFS since 1972 to predict recidivism and guide parole decisions. *See generally* Hoffman, *supra* note 117; Peter B. Hoffman & James L. Beck, *Parole Decision-Making: A Salient Factor Score*, 2 J. Crim. Just. 195 (1974).

120. *See* U.S. Sentencing Comm’n, Supplementary Report on the Initial Sentencing Guidelines and Policy Statements 43 (1987); *see also* Hoffman, *supra* note 117.

121. U.S. Sentencing Guidelines Manual, ch. 4, pt. A, introductory cmt.

122. *Id.*

123. *See* Vernon L. Quinsey et al., *Violent Offenders: Appraising and Managing Risk* (1998); John A. Swets et al., *Better Decisions Through Science*, *Sci. Am.*, Oct. 2000, at 82.

predictive power. The AUC has several desirable qualities as a prediction power gauge. First, and in the context of criminal history points predicting recidivism, the AUC is interpreted as the probability that a randomly chosen known recidivist will have more criminal history points than a randomly chosen known non-recidivist. Therefore, the AUC ranges from 0.5 to 1.0. With an AUC of 0.5, a randomly chosen known recidivist has only a 50% chance of having more criminal history points than a randomly chosen non-recidivist. In this case, the model has no predictive power; only by pure chance will a recidivist have more criminal history points than a non-recidivist. When the AUC is 1.0, then 100% of the randomly chosen recidivists will have more criminal history points than the randomly chosen non-recidivists; criminal history points would predict recidivism perfectly. With an AUC of 1.0, in other words, all recidivists would have more criminal history points than all non-recidivists. AUCs between 0.5 and 1.0 indicate a better than chance predictive accuracy, but a less than perfect predictive accuracy. For example, an AUC of 0.67 would indicate that for 67 times out of a total of 100 times comparing randomly chosen recidivists and non-recidivists, recidivists would have more criminal history points than non-recidivists.

A second desirable property of the AUC is—unlike other statistical measures of predictive power—the consistency and comparability of its estimates when used with different groups with varying recidivism rates. This consistency is important for estimating recidivism among groups with vastly different base recidivism levels. Finally, a third desirable property is its ability to measure statistically significant differences among AUC estimates. It can assess the statistical difference between two AUC estimates for varying predictive models, or between the same predictive model applied to two different groups of offenders, and permit conclusions regarding which model formulation significantly improves predictive power.¹²⁴

As seen in Table 12, the AUC for the current criminal history score predicting the primary recidivism measure is 0.699, which is significantly better than chance at the 95% confidence levels. Therefore, an offender's criminal history as it is currently incorporated in the Guidelines has a non-trivial ability to predict his likelihood of recidivating. Although an imperfect measure of future criminality, the current criminal history configuration thus appears to

124. Elizabeth R. DeLong et al., *Comparing the Areas Under Two or More Correlated Receiver Operating Characteristic Curves: A Nonparametric Approach*, 44 *Biometrics* 837 (1988); James A. Hanley & Barbara J. McNeil, *The Meaning and Use of the Area Under a Receiver Operating Characteristic (ROC) Curve*, 143 *Radiology* 29 (1982); James A. Hanley & Barbara J. McNeil, *A Method of Comparing the Areas Under Receiver Operating Characteristic Curves Derived from the Same Cases*, 148 *Radiology* 839 (1983).

provide precisely what the original Commission sought: a rough measure of the likelihood that an offender will engage in future criminal activity.

A. Recidivism for First Offender Groups A, B, and C

Table 12 compares the relative predictive accuracy of the currently constructed CHC scores with a contrasting formulation in which first offenders are grouped uniquely together outside of the current six CHCs.¹²⁵ In other words, we compare the predictive power of the present CHC model with alternative formulations. The bottom four rows of Table 12 report prediction levels for four alternative first offender definitions.

TABLE 12:¹²⁶ PREDICTIVE STRENGTH OF CRIMINAL HISTORY
RECIDIVISM PREDICTION USING ALTERNATIVE FORMULATIONS OF
FIRST OFFENDER DEFINITIONS

Variations of First Offender Definition	Area Under Curve (AUC) ¹²⁷	95% Confidence Interval	
		Lower	Upper
Current Criminal History Points ¹²⁸	0.699	0.691	0.707
Isolating First Offenders Defined as:			
(i) Group A only	0.722	0.715	0.730
(ii) Groups A and B Combined	0.715	0.707	0.723
(iii) Groups A and C Combined	0.723	0.715	0.731
(iv) Groups A, B, and C Combined	0.715	0.708	0.724

When first offenders are defined to include only those offenders with no prior arrests (Group A-only offenders on line i in Table 12), the prediction statistic AUC is 0.722. This value is larger than the AUC for the current criminal history measure (0.699). In other

125. In order to compute AUCs for the various first offender composition alternative definitions, the following convention is employed. Offenders in a given first offender definition grouping of Table 12 are each assigned zero criminal history points, while all remaining offenders have one additional point added to their actual fiscal year 1992 criminal history score. For example, when assessing the predictive power for first offenders defined solely as offenders in Group A, Group A offenders are assigned zero points, the remaining old zero-point offenders are assigned one point, the old one-point offenders are assigned two points, old two-point offenders are assigned three points, and so on.

126. FY 1992 Recidivism Sample, *supra* note 40. Statistics are based on weighted data.

127. AUC statistic for alternatives (i), (ii), (iii), and (iv) are significantly different at the 0.05 level from the AUC for the current criminal history definition which defines first offenders as all offenders with zero criminal history points.

128. The current criminal history definition includes by default first offenders as any offender with zero criminal history points. U.S. Sentencing Guidelines Manual ch. 4 (2002).

words, defining first offenders as Group A-only offenders, as opposed to grouping them together as the CHC currently do, significantly improves the Criminal History Categories' ability to predict recidivism.

When the definition of first offenders is expanded from Group A offenders to also include offenders with prior arrests but no prior convictions (Group B offenders), the AUC (on line (ii) in Table 12) drops to 0.715. This is lower than the AUC for Group A offenders only, on line (i). This decline, however, is consistent with the relatively and significantly higher recidivism rate for Group B offenders, as described in Table 6.

Nonetheless, the AUC for a first offender definition incorporating both Group A and Group B offenders is significantly different, and much greater, from the AUC for the current criminal history formulation. Defining both Groups A and B combined as first offenders, as on Table 12 line (ii), increases predictive power above that of the current guideline criminal history scheme. It appears clear, however, that the majority of the predictive improvement is from defining Group A offenders as a specific category, as indicated by the AUC for the Group A-only definition of line (i) in the Table.

When Group A offenders are combined with Group C offenders (who are zero-point offenders with "never count" minor prior convictions only), the AUC (on line (iii) of Table 12) is 0.723. While this AUC has a value absolutely larger than the AUC for the Group A-only offenders on line (i), the statistical test fails to find a significant difference between the two AUCs. Thus, at the 95% level of confidence, it is concluded that in fact these AUCs may be equal for the Group A-only and the Group A and Group C definitions.

Finally, the AUC on line (iv) for a first offender group consisting of all Groups A, B, and C is 0.716. Again, while absolutely larger in value than the AUC of 0.715 on line (ii) for a Group-A and Group-B category, a statistical test indicates no significant difference between the AUCs of line (ii) and line (iv).

In summary, the possible first offender categories defined by Groups A, B, or C, all definitions of a possible first offender category as shown in Table 12, indicate improvements in recidivism prediction above and beyond the prediction ability of the Guidelines' current criminal history formulation. The greatest improvement over current practice is obtained when first offenders are defined as Group A-only offenders (line (i) on Table 12), or as Group-A and Group-C offenders (line (iii) in Table 12). Including Group B offenders in the first offender definition, in all cases, diminishes the magnitude of the improved predictive power achieved from adding first offender Groups A and C. These findings are fully consistent with the analysis and conclusions emanating from the analysis of group-specific recidivism rates discussed earlier in this Article.

B. Recidivism for First Offenders Meeting Low Culpability Criteria

The Commission has not entirely ignored the issue of whether to treat first-time offenders differently from other offenders. In fact, the Commission at one time created a working group to consider specific sentence reductions for first offenders who met specific criteria of low culpability. One set of specific criteria previously suggested specified sentence reductions for first offenders with an instant offense that was *not* a “crime of violence or an otherwise serious offense.”¹²⁹ The rationale was that such offenders were unlikely to recidivate, and thus warranted somewhat lessened sentences.

A related but more restrictive set of criteria currently in the Guidelines for identifying non-violent, non-dangerous, low-risk offenders are those used to determine eligibility for sentence reductions under section 5C1.2(1).¹³⁰ At least as a starting point for discussion, it is instructive to consider these low-culpability criteria to identify first offender eligibility.

All offenders in Groups A, B, and C meet the first criterion of section 5C1.2(1): they have zero criminal history points—at least as the Guidelines currently assign such points. Federal Sentencing Guidelines’ section 5C1.2 has four additional qualifying criteria for the instant offense conduct: no violence or weapon use, no bodily injury, a mitigating role, and acceptance of responsibility.¹³¹ The number and percentage of each first offender group meeting all four of these low culpability criteria are shown in Table 4: 73.6% for Group A, 64.4% for Group B, and 68.9% for Group C. Moreover, the recidivism rates for first offenders in Groups A and B who meet the section 5C1.2 criteria are lower than for those who do not satisfy these criteria. Importantly, for Group A first offenders, the two-year recidivism rate is 6.2% for those who meet all section 5C1.2 criteria, and 8.7% for those who do not. By comparison, for Group C first offenders, the recidivism rate is 8.6% for those who meet the section 5C1.2 criteria and 9.2% for those who do not.

For Group B first offenders, however, there is little difference in recidivism rates between those who meet the safety valve criteria and those who do not. Both recidivate at a rate of approximately 17%.

129. 28 U.S.C. § 994(j) (2002); *see also* Criminal History Working Group, U.S. Sentencing Comm’n, Discussion Concerning Categories “0” and “VII” (1990).

130. These criteria are described in section 5C1.2, “Limitation on Applicability of Statutory Minimum Sentences in Certain Cases,” and apply to low culpability offenders who are not violent, do not use weapons, and cooperate fully. *See* U.S. Sentencing Guidelines Manual § 5C1.2 (2002). This provision is known as the “safety valve” in that it provides an escape valve from strict mandatory minimums for minor role drug traffickers with minimal criminal history. *See id.*

131. *Id.*

C. A Policy Decision Underlies the First Offender Definition

Congress has clearly indicated its preference to have first offenders treated differently from those who are repeat offenders.¹³² The difficulty, of course, is in deciding who qualifies as a first-time offender and explaining why such differential treatment is warranted. The discussion above exposes several strategies for defining a first offender group under the Federal Sentencing Guidelines. Under any definition of first-time offender, the likelihood that the offender will engage in criminal conduct in the future ought to be the touchstone in deciding whether different treatment is warranted. The low level of recidivism for Group A compared to the remaining offender groups, as shown in Table 6, suggests one first offender definition: First offenders can be defined exclusively as Group A offenders. In addition to the increased predictive power of the current Criminal History Category groupings, this has the benefit of making intuitive sense: When most people think of a first-time offender, they presumably think about an individual who has never before had contact with the criminal justice system. It may well be that this was the sort of individual Congress contemplated when it directed that first-time offenders be treated differently from other offenders.

A variation on this definition might be expanded to include Group C, which, along with Group A, has a low level of recidivism compared to the remaining offender groups. Without damaging the model's predictive power, first offenders might be defined as Group A, with the addition of Group C offenders from within current CHC I. As with the first definition suggested, treating these offenders separately in the chapter four provisions increases the predictive power of the current Guidelines' criminal history measure.

A third definition identifies offenders in terms of low culpability criteria, such as the criteria of section 5C1.2 discussed above.¹³³ Offenders in Groups A and C whose conduct in the instant offense does not involve violence or a weapon, who cause no injury, whose role in the instant offense is minor, and who accept responsibility are less likely to recidivate. The specific criteria can be tailored and need not mirror those of section 5C1.2. One issue needing study under this definitional approach, however, is the overlap that will result with the sentencing reductions to drug trafficking offenders who meet the so-called federal "safety valve" conditions. As part of the 1994 Crime Bill, Congress enacted a sentencing "safety valve,"¹³⁴ which enabled certain low-level drug offenders to escape out from under mandatory minimum drug sentences, provided the offenders met fairly rigorous

132. See 28 U.S.C. § 994(j).

133. See *supra* notes 130-31 and accompanying text.

134. See 18 U.S.C. §§ 3553(f)(1)-(5) (2000).

criteria.¹³⁵ Those first offenders who meet the safety valve criteria are likely to meet the first offender definition as well. A policy is needed to determine if such an offender can benefit from both sentencing reductions, the section 2D1.1¹³⁶ safety valve, and the potential first offender charges.

Another definitional approach focuses on the instant offense itself, as described above by the Commission's 1990 working group on criminal history.¹³⁷ First offender status can be limited to offenders whose instant offenses, and/or prior offenses, do not involve either crimes of violence or an otherwise serious offense. While this seems not to adversely affect the criminal history measure's current predictive power, it does not fully comport with the colloquial understanding of what constitutes a first-time offender, and thus may not be an appropriate choice.

It is important to note that the first offender definitions provided above are not mutually exclusive. A final policy definition can select features of the different strategies to finalize a first offender definition that meets practical and policy considerations. It is vital that Congress's directive be given effect and that the Criminal History Categories retain their power to predict future criminal behavior. While no model is ever perfect in this regard, it seems reasonable to conclude that nothing should be done to the Criminal History Categories that would decrease their predictive power.

V. INCORPORATING A FIRST OFFENDER PROVISION UNDER THE GUIDELINES

Over the past fifteen-plus years the Commission has repeatedly studied and then deliberated about ways to address issues of the reduced culpability and lower recidivism risk characteristics of first offenders, with a "first-time offender" defined in various ways, but always targeting federal defendants with no, or practically no, prior criminal history. An analysis of the Commission's past deliberations reveals four basic policy strategies that could be used to recognize first

135. The safety valve legislation provides that the defendant should: (1) have no more than a single criminal history point; (2) not have used violence or credible threats of violence or possess a firearm or any other dangerous weapon in connection with the offense; (3) have neither an aggravated role in the offense, nor have otherwise acted as an organizer or supervisor of others in committing the offense; and (4) have provided, no later than the time of the sentencing hearing, all truthful information in his possession concerning the offense itself, or any offenses that were part of the same scheme of conduct. In addition, the present offense of conviction could not have resulted in the death or serious bodily injury of any person, and must have been a narcotics violation for which a mandatory minimum sentence applied and which could not be any lower than a base offense level of twenty-six. *Id.*; see also O'Neill, *supra* note 32.

136. See U.S. Sentencing Guidelines Manual § 2D1.1 (2002).

137. See Criminal History Working Group, U.S. Sentencing Comm'n, *supra* note 129.

offender status by implementing specific provisions, often under specified conditions:

- a new Criminal History Category Zero column in the sentencing table;¹³⁸
- a chapter four criminal history adjustment;¹³⁹
- a first offender sentencing option in chapter five;¹⁴⁰ and
- a first offender guided departure.¹⁴¹

Regardless of how (or whether) a final first offender definition is established, a first offender provision can be implemented using one, or a combination, of these implementation strategies. The Commission could, for example, leave the criminal history categories intact, but offer the possibility of a guided departure or sentencing adjustment to offenders meeting the pre-defined criteria. Or, the Commission could simply create a new criminal history category altogether. Regardless, this part examines each of these options in turn to discuss issues of definition and implementation.¹⁴² Each possibility has its own particular attractions, as well as complexities. Moreover, this discussion is premised on the notion that the Commission will do something to take first-time offender status into account in fashioning sentences.

A. Option 1: A New Criminal History Category Zero in the Sentencing Table

One policy suggestion would alter the sentencing grid's criminal history axis by creating a new Criminal History Category Zero ("CHC Zero") for first-time offenders. The policy debate surrounding CHC Zero focuses on how the new CHC would be incorporated into the current sentencing table. It might be argued that CHC Zero should be a sentencing reduction for those offenders with extremely low Criminal History Category scores. As such, the defined group of first offenders would be extracted from the current CHC I and given lower sentencing ranges than those currently given to other offenders in CHC I.

It could also be asserted that first offenders in CHC I are already receiving sentencing discounts as part of the current guideline

138. See *infra* Part V.A.

139. See *infra* Part V.B.

140. See *infra* Part V.C.

141. See *infra* Part V.D.

142. Although beyond the scope of this Article, considerable discussion has been given as to whether the Criminal History Categories go high enough. In other words, additional categories beyond the present top level of CHC VI may be needed. Similarly, the proposals offered here with respect to first-time offenders are far from exhaustive. They represent a starting point for discussing whether congressional mandates are properly being followed, and whether the present Criminal History Categories are constructed appropriately.

formulation and the problem is that those non-first offenders in current CHC I have been receiving reductions that are unjustified by their relatively higher recidivism rates. Thus, it could be argued that the appropriate solution to the issue is to move up the non-first offenders in the current CHC I sentencing ranges to a higher criminal history group with higher ranges commensurate with their higher recidivism rates. The newly defined first offenders would thus comprise the current CHC I. Numerous alternatives can be designed for how the non-first offenders can be distributed throughout the remaining higher CHCs under this perspective.

The issue, then, is whether to create an entirely new criminal history category for first offenders, or rather to redistribute those offenders in CHC I to other categories so that only first offenders remain. Evidence at present suggests that no political consensus exists with regard to adoption of the first or the second perspective. Whichever is decided, because first offenders comprise a large proportion of all offenders, sentences will be affected for many defendants.

B. Option 2: A Chapter Four Criminal History Adjustment

Instead of reconfiguring the criminal history categories themselves, the Commission could elect to provide an adjustment in chapter four to take first-time offender status into account. Chapter four of the Guidelines expressly deals with criminal history.¹⁴³ A first offender chapter four sentence reduction might include one of three possibilities. First, a first offender offense level “reduction” could operate as an offense level cap (e.g., limiting the level to no more than an offense level 12), much like the current Criminal Livelihood adjustment of section 4B1.3,¹⁴⁴ but instead, of course, providing an offense level maximum instead of an offense level minimum. A second approach might be to provide first offenders with a reduction in the offense level (e.g., 2-, 4-, or 6-level reduction). Finally, both of these approaches could be combined by implementing an offense level cap with an offense level reduction (e.g., a 2-, 4-, or 6-level reduction, but never more than offense level 12). By providing a chapter four adjustment of this sort, the Commission would avoid the problems inherent in creating a new criminal history category but still enable judges to consider first-time offender status.

C. Option 3: A First Offender Sentencing Option in Chapter Five

The Commission could also place a first offender option within the Guidelines’ chapter five, which lays out the sentencing tables themselves, and includes various alternatives to incarceration.¹⁴⁵ In

143. U.S. Sentencing Guidelines Manual ch. 4 (2002).

144. U.S. Sentencing Guidelines Manual § 4B1.3 (2002).

145. *Id.* ch. 5.

this fashion, chapter five imprisonment alternatives might be offered to the first offenders who meet the criteria described, allowing probation for certain first offenders who meet the criteria. After all, Congress has expressly directed sentencing courts to consider the defendant's "history and characteristics" in order "to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner."¹⁴⁶ For some such offenders, probation may be a more efficacious option. Policy makers, however, may require that probation alternatives be limited to first offenders among the low offense levels while alternative confinement options may be considered for first offenders with middle level offense computations.

Additionally, the use of sentencing alternatives to imprisonment for first offenders can be conditioned on them undergoing treatment for problems linked to their offending. Table 13 shows first offender recidivism rates by the following: illicit drug use, alcohol problems, employment status, and educational attainment. Within each first offender group, offenders who used illicit substances in the year prior to their instant offense or had alcohol problems had a recidivism rate considerably higher than those who did not use illicit substances or had no alcohol problem. First offenders who were unemployed in the year prior to their instant offenses had substantially higher recidivism rates than those who were employed. Offenders who did not have a high school degree had recidivism rates substantially higher than those who did.

146. 18 U.S.C. § 3553(A)(2)(D) (2000).

TABLE 13:¹⁴⁷ RECIDIVISM RATES FOR SELECTED PERSONAL CHARACTERISTICS OF OFFENDERS BY CRIMINAL HISTORY CATEGORY AND CRIMINAL HISTORY POINTS WITH DETAILS FOR ZERO-POINT OFFENDER CATEGORIES RECIDIVISM STUDY 2003

	CRIMINAL HISTORY CATEGORY I										CATEGORIES II – VI			
	ZERO-POINT OFFENDERS													
Recidivism Rate by Personal Characteristics	Total Zeroes		Group A no arrests		Group B no convictions		Group C never-count convictions ¹⁴⁸		Remaining Zeroes		ONE-POINT OFFENDERS		TWO OR MORE-POINT OFFENDERS	
	N	%	N	%	N	%	N	%	N	%	N	%	N	%
TOTAL¹⁴⁹	12,546	100.0	7,448	100.0	2,089	100.0	416	100.0	2,592	100.0	2,871	100.0	8,906	100.0
Recidivism Rate by Illicit Drug Use¹⁵⁰														
No Illicit Drug Use	836	9.0	297	5.1	253	16.6	12	3.7	274	16.7	384	19.5	1,596	33.3
Illicit Drug Use	629	19.5	211	13.0	107	18.7	24†	26.8	288	30.1	267	29.6	1,654	40.2
Recidivism Rate by Alcohol Problem¹⁵¹														
No Alcohol Problem	1,347	11.2	487	6.7	328	16.6	36	9.5	495	20.4	607	23.2	2,744	35.7
Alcohol Problem	119	22.9	21	9.8	31†	29.1	0†	0.0	66	40.0	44	17.0	505	41.3
Recidivism Rate by Employment Status¹⁵²														
Unemployed	325	18.2	99	10.5	86	24.3	12†	36.7	128	28.2	110	33.3	1,090	42.1
Employed	1,141	10.6	409	6.3	274	15.8	24	6.3	434	20.3	540	21.3	2,159	34.2
Recidivism Rate by Educational Attainment¹⁵³														
Less than High School	539	17.7	136	8.9	153	27.9	12†	20.5	237	26.2	314	33.0	1,599	41.9

147. FY 1992 Recidivism Sample, *supra* note 40. Missing data are excluded, unless specified.

148. This refers to prior arrests with no dispositions and convictions for only the “never-count” offenses specifically listed in section 4A1.2(c)(2). See U.S. Sentencing Guidelines Manual § 4A1.2(c)(2).

149. “Total” refers to the number of offenders with a twenty-four month period at risk of recidivating following either initiation of probation (for offenders receiving probation-only sentences) or release from confinement (for those offenders receiving confinement sentences).

150. “Illicit drug use” refers to use during the year prior to the instant offense. Missing values are counted as “No Illicit Drug Use.”

151. “Alcohol Problem” is defined as more than one past conviction for DUI or public drunkenness, or past unsuccessfully completed, current or planned treatment, or the offender’s admitting to a problem.

152. “Employment status” refers to the period during the year prior to the instant offense. “Employed” includes alternative forms of employment and “Unemployed” includes missing values.

153. “Educational attainment” refers to status at the time of the instant offense.

High School or More	927	9.8	373	6.3	206	13.4	24	6.8	324	19.4	336	17.5	1,625	32.2
‡ Indicates fewer than 10 sample subjects, unweighted. Findings may not be statistically significant.														

Drug and alcohol abuse, unemployment, and a low level of educational attainment have all been linked to greater recidivism risk. Consequently, rehabilitation programs—such as substance abuse treatment, post-release employment training, or education courses—targeted toward such offenders have been shown to have some success at reducing recidivism among federal offenders.¹⁵⁴ Recidivism might be reduced by placing conditions on first offenders with specific problems: successful completion of a substance abuse program by offenders with a drug or alcohol problem finding and retaining employment upon release into the community; or, for offenders not having a high school degree, attending school until graduation or upon passing the general equivalency diploma (“GED”) exam. Addressing these needs might even further reduce recidivism rates for offenders in Group A or Group B, although the same can be said for all offenders. It may be difficult for the Commission to advocate treatment targeted solely at first offenders, despite the fact that such an effort may have the greatest long-term returns.

D. Option 4: A Guided Departure for First Offenders

An additional option worth considering is the inclusion of a permissible, guided departure for certain first-time offenders. A guided departure, placed in chapter five, might offer one of the following first offender departure alternatives: an offense level reduction (e.g., 2, 4, 6 levels), a departure to a specific sentence type, or a departure to a specific zone of the sentencing table. Such a departure may even be conditioned upon the prosecutor’s explicit approval or request in much the same way a section 5K1 motion is offered.¹⁵⁵

A guided departure of this sort may provide sufficient flexibility to courts faced with sentencing first-time offenders, yet at the same time ensure that similar cases are treated alike. In light of recent policy

154. See generally Miles D. Harer, Prison Education Program Participation and Recidivism: A Test of the Normalization Hypothesis (Fed. Bureau of Prisons, U.S. Dept. of Just., Unpublished Report 1995), available at <http://www.bop.gov/orepg/orepredprg.pdf>; Bernadette Pelissier et al., TRIAD Drug Treatment Evaluation Project Six-Month Interim Report (Fed. Bureau of Prisons, U.S. Dept. of Just., Unpublished Report 1998), available at <http://www.bop.gov/orepg/oretriad6.pdf>; William G. Saylor & Gerald G. Gaes, *Training Inmates Through Industrial Work Participation and Vocational and Apprenticeship Instruction*, 1 Corrections Mgmt. Q. 32, 43 (1997).

155. The government offers a 5K1 motion when it determines that the defendant has cooperated sufficiently to warrant a downward departure from the otherwise applicable guideline sentence. See U.S. Sentencing Guidelines Manual § 5K1 (2002).

directives by Congress,¹⁵⁶ however, it appears unlikely that a first offender departure for criminal history can garner Commission approval. Regardless, such an approach is at least worth exploring as it may be the simplest means of dealing with first offender status.

VI. FURTHER CONSIDERATIONS

The Commission has evinced a long standing interest in possible first offender provisions. Building upon the work of past internal working groups,¹⁵⁷ this Article has identified three basic first offender definition classes. These three classes have been denoted here as Group A (offenders with no prior arrests), Group B (offenders with prior arrests, but no prior convictions), and Group C (offenders whose only prior convictions are minor offenses not factored into the criminal history calculation).

Possibilities for a first offender provision suggest the following substantive conclusions regarding each of the three potential first offender groups. First, and clearly from both criminal history and recidivism risk perspectives, Group A offenders—who are without any prior arrests—stand out as prime candidates for inclusion in a first offender category. Offenders in this group have had no recorded contact with the criminal justice system prior to their instant federal offense. Compared to any other offender group, the set of Group A first offenders has the largest percentage of its members satisfying the current guideline section 5C1.2 criteria identifying non-violent, low-level, low-culpability offenders.¹⁵⁸ Moreover, as indicated by its extremely low recidivism rate of 6.8%,¹⁵⁹ Group A is the single empirically identifiable group of federal offenders least likely to re-offend following their return to the community.

Group C offenders are similarly attractive candidates for inclusion in a definition of first-time offenders. These offenders have had only very minor contact with the criminal justice system prior to their instant offense, and those previous convictions have tended to consist solely of relatively minor traffic or public order crimes. None of their prior offenses consisted of serious or violent offenses. With a

156. Among other directives, section 401(m) of the Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003 (PROTECT Act) requires the Commission to undertake steps to reduce the number of downward departures under the Guidelines. See *Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003 (PROTECT Act)*, § 401(m), Pub. L. No. 108-21, 117 Stat. 650 (to be codified as amended in scattered sections of 18 U.S.C., 28 U.S.C., and 42 U.S.C.).

157. See, e.g., Maxfield et al., *supra* note 41; Memorandum from the Working Group on Criminal History to Phyllis Newton, *supra* note 45; Criminal History Working Group, *supra* note 129; U.S. Sentencing Comm'n, *supra* note 11.

158. See *supra* Table 4.

159. See *supra* Table 6.

recidivism rate of 8.8%,¹⁶⁰ the overwhelming majority are not likely to recidivate.

Group B offenders are the least compelling candidates for first offender status. While they have no prior convictions, it appears that their absence of prior convictions is often due to prosecutorial declinations or pending prosecutions at the time of the federal offense sentencing. They all have a history of arrests and have often been charged with fairly serious offenses. Group B, with its recidivism rate of 17.2%,¹⁶¹ has a substantially greater risk for future offending, almost three times that of Group A offenders and almost twice that of Group C offenders.

One implementation option for a first offender provision would create a first offender Criminal History Category Zero. The analysis indicates that this new guideline of criminal history category can significantly improve the ability to predict recidivism. Maximum predictive improvement is obtained by defining first offenders as members of Group A with or without Group C: either those with no prior arrests alone, or in combination with those whose prior convictions are guideline section 4A1.2(c)(2)¹⁶² minor offenses only, and are therefore not counted.

Comparing recidivism rates helps to identify the risk that first offenders may pose to the public. However, many legal and policy issues remain to be discussed and resolved regarding the identification of first offenders as a unique group in the Guidelines. One sensitive issue is the legal and policy justification for distinguishing between Group A and Group B. Neither offenders in Group A nor Group B have any prior convictions. They differ only in that offenders in Group A have no prior arrests. Is there an acceptable justification for excluding Group B offenders from first offender status based solely on a prior arrest for which the offender was found not responsible or for which the offender is awaiting a disposition? It is not difficult to argue that the exclusion of Group B offenders from the first offender definition violates a fairness principle, empirical evidence of their increased culpability shown in the analysis notwithstanding.

A second implementation issue involves the prior criminal history exclusion rules under the Guidelines. A decision is needed on how the first offender definition should address foreign, tribal, and juvenile status convictions, which currently are excluded from chapter four computation.¹⁶³ A foreign conviction may not meet the constitutional standards of a conviction in federal or state court, and may be difficult routinely to obtain. Should British citizens be disadvantaged because

160. *See supra* Table 6.

161. *See id.*

162. U.S. Sentencing Guidelines Manual § 4A1.2(c)(2).

163. *Id.* ch. 4.

we can readily obtain their criminal records while we have trouble unearthing those convicted in Russian courts? Tribal and juvenile convictions may be hard to uncover, indeed, some states seal juvenile records completely. Moreover, some juvenile offenses are entered without certain of the constitutional protections afforded adults.

The criminal history computation also excludes “decayed” convictions; in other words, convictions that occurred a specified number of years prior to the instant offense. It is unclear why a conviction, merely because it is dated, ought to be excluded from the criminal history calculation, especially when the offender has had no pause in his criminal activity over time.

A third issue focuses on unintended disproportionality. This occurs when a seemingly neutral policy decision disproportionately disadvantages certain demographic groups. For example, the analysis illustrates that offenders under the proposed first offender definitions are disproportionately female, non-minority, noncitizens, and older than the average offender. They are also disproportionately more likely to have instant offenses consisting of fraud and other white-collar offenses.

A further implementation issue is the overlap of a first offender provision with other sentencing reductions, particularly the drug trafficking safety valve. There is a logical and high correlation between first offenders and safety valve eligibility. Table 4 estimates that between two-thirds and three-fourths of Groups A, B, and C offenders meet the instant offense criteria of no violence, no weapon, no injury, minor role, and acceptance of responsibility.¹⁶⁴ A first offender policy may wish to deny multiple low-culpability sentencing reductions for any given individual.

If the presence of prior arrests becomes a key element in the definition of a first offender provision, further investigation must determine the ability of probation officers to collect complete and verifiable arrest information in the pre-sentence reports. The data on prior arrests used here to define Group A were obtained from pre-sentence report information. Because currently only prior convictions are considered when calculating criminal history points, it cannot be assumed that current pre-sentence reports uniformly collect complete prior arrest information. It is likely that the recording of prior arrest events in the pre-sentence report varies by circuit, district, probation office, or even probation officer. Under a first offender definition that embraces Group A, the Commission must adopt a policy for the collection and reporting of prior arrests, perhaps, as some probation officers now do, including such information in a separate “other conduct” section of the pre-sentence report. A review of the completeness of prior arrest pre-sentence report coverage across

164. See *supra* Table 4.

probation offices will be needed.¹⁶⁵

The data available from the current recidivism project bring a new dimension to analyzing the role of criminal history in the federal guidelines system. As demonstrated above, the data themselves do not—indeed, cannot—determine which offenders qualify as first offenders, nor what sentencing provisions, if any, should apply to them. Instead, the data provide, far beyond any previously available research, descriptions of possible first offender groups, expanding knowledge of their criminal culpability and their risk to public safety. The policy deliberations regarding the form of a first offender guideline provision can now go forward with a more fully informed understanding of who possible first offenders might be and what public good might be achieved from any sentencing accommodation they receive.

CONCLUSION

The question of whether to re-examine Criminal History Categories in an effort to determine whether they are performing their intended role is an important one. In particular, it is useful to know whether the currently constructed Criminal History Categories serve as useful tools to accurately predict future criminal behavior. Similarly, given Congress's statutory directive to treat first-time offenders differently from recidivists,¹⁶⁶ it is worth considering whether such first-time offenders ought to be differentiated from those with more serious criminal histories. In its ongoing effort to reform federal sentencing, Congress has directed the Commission to ensure that its guidelines "reflect . . . advancement in knowledge of human behavior as it relates to the criminal justice process" and "to develop means of measuring the degree to which . . . sentencing . . . practices are effective in meeting the purposes of sentencing."¹⁶⁷ If the criminal history categories are to serve their intended purpose, they must accurately reflect the likelihood that a defendant will re-offend. If they fail to differentiate properly among defendants, or are unable to predict recidivism among offenders with any degree of accuracy, then it is worth questioning whether they have any continuing value as presently calibrated. In the 1984 Sentencing Reform Act,¹⁶⁸ Congress undertook a major overhaul of federal sentencing and charged the

165. To examine the completeness of arrest information, a small sample of offenders was selected for a comparison of arrests reported in the pre-sentence reports and arrests reported on RAP sheets obtained from the FBI. The analysis indicates substantially more arrest events appear in pre-sentence reports. While this finding is encouraging, this analysis cannot verify that arrest data can be fully reported in pre-sentence reports.

166. 28 U.S.C. § 994(j) (2000).

167. 28 U.S.C. §§ 991(b)(1)(C) & (b)(2).

168. Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, 98 Stat. 1837.

Commission with important tasks to implement its vision; it is now up to the Commission to ensure that reforms Congress initiated are carried out.

Notes & Observations